No. 13640

United States Court of Appeals

for the Ninth Circuit.

CLARK SQUIRE, Collector of Internal Revenue for the District of Washington,

Appellant.

vs.

HORTON CAPOEMAN and EMMA CAPOEMAN, his wife,

Appellees.

Transcript of Record

Appeal from the United States District Court for the Western District of Washington, Southern Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—4-30-53

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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. 134

CLARK SQUIRE, COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF WASHINGTON, PETITIONER

vs.

HORTON CAPOEMAN AND EMMA CAPOEMAN, HIS WIFE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 8, 1955
CERTIORARI GRANTED OCTOBER 10, 1955

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Deductions

18. Income Tax net income (Item 10, Col. 1, less Item 17, Col. 1) $2,859.32

Income and Victory Tax

20. Unpaid balance of 1943 Income and Victory Tax (from line 22, page 4) $298.11

22. Amount paid with this return (item 20 less item 21) $298.11

23. Refund or Credit:

If the total of your payments (line 21 (d) on page 4) is larger than your tax (line 20 on page 4), enter the difference 6% interest from 3/15/44 to 10/15/47 ..... $ 64.09

Indicate by a check mark (√) what you want done with this overpayment: Refund it to me [ ]; Apply it on my 1944 estimated tax [ ] $362.20

I declare under the penalties of perjury, that this return (including any accompanying schedules and statements) has been examined by me and to the best of my knowledge and belief is a true, correct, and complete return. (Date) Oct. 10/47.

Schedule I.—Personal Exemption and Credit for Dependents.
(See Tax Computation Instructions)

(1) Personal Exemption

Status: Single, or married and not living with husband or wife, and not head of family; 12 months; credit claimed $1,200.00.

(2) Credit for Dependents

Name of dependent and relationship: Wife; 18 years or over, 12 months; credit claimed $600.00.

Schedule J.—Computation of Earned Income Credit.
(See Tax Computation Instructions)

(1) If your net income is $3,000 or Less, use only this part of schedule

Net income (item 18, page 1) $2,859.32

Earned income credit (10% of net income, above) 285.93

Question's

1. Did you file a return for any prior year? no.
3. If separate return was made for the current year, state: no.
4. Check whether this return was prepared on the cash [X] or accrual [ ] basis.
5. Was the rate of your salary or wages increased or decreased during your taxable year? (Yes or No) No.

NAMES AND ADDRESSES OF COUNSEL

J. CHARLES DENNIS,
United States Attorney,

GUY A. B. DOVELL,
Assistant United States Attorney,
324 Federal Bldg.,
Tacoma (2), Wash.

THOMAS R. WINTER,
Attorney, Bureau of Int. Revenue,
Smith Tower Bldg.,
Seattle, Wash.
For Squire.

KENNETH R. L. SIMMONS,
221 Fratt Bldg.,
Billings, Montana.
For Taxpayer.

7. Did you at any time during your taxable year own directly or indirectly any stock of a foreign corporation, or a personal holding company as defined by section 501 of the Internal Revenue Code? No.

Computation of Income and Victory Tax. Page 4
(See Tax Computation Instructions)

1.	Income tax net income (Item 18, P. 1)		$2,859.32
3.	Less: Credit for dependents (From Schedule I-(2)		$2,859.32
4.	Balance (surtax net income)	$1,200.00	
5.	Less: Certain interest on Government obligations (item 4 (a), page 1)		$1,200.00
6.	Earned income credit. (From Schedule J-(1) or J-(2))		1,659.32
8.	Normal tax (6% of line 7)	285.93	$ 285.93
9.	Surtax on amount in line 4. (See Surtax Table, page 3 of Instructions)		1,373.39
10.	Total Income Tax (line 8 plus line 9). (If Schedule B is used and alternative tax computation made, enter line 16, Schedule B)		$. 82.40
11.	Less: Income Tax paid to a foreign country or U.S. possession. (Attach Form 1116)		215.71
12.	Balance of Income Tax		$ 298.11
14.	Total of lines 12 and 13		$ 298.11
16.	Line 14 less line 15		$ 298.11
18.	Enter line 16 or 17 whichever is Larger. (Members of the armed forces see page 4 of Instructions)		$ 298.11
19.	Forgiveness Feature (Don't fill in (a), (b), and (c) below, if either line 16 or 17 is $50 or less): (a) Enter line 16 or 17, whichever is Smaller		298.11
21.	Less: (b) Income Tax paid on 1942 income		$ 298.11

Footnote 1.—If you claim a credit in line 15, disregard lines 19(a) and (b), complete Schedule L-1 on page 4 of Instructions, and enter result in line 19(c). Attach completed schedule. $298.11

Schedule D. (Form 1040)—U.S. Treasury Dept., Int. Revenue Service.

Schedule of Gains and Losses From Sales or Exchanges of (1) Capital Assets and (2) Property Other Than Capital Assets
(To Be Filed With the Collector of Internal Revenue With Form 1040)
For Calendar Year 1943

Name of taxpayer, Horton Capoeman.
Address, Tahola, Wash.

Long-Term Capital Gains and Losses—Assets Held For More Than 6 Months

1. Kind of property, Timber.
2. Date acquired, 10/1.
3. Date sold, 1943.
4. Gross sales price (contract price) $8,418.28
5. Cost or other basis, $2,026.80.
6. Expense of sale and cost of improvements subsequent to acquisition or Mar. 1, 1913 ..... $ 673.46
8. Gain or loss, $5,718.64. Gain or loss to be taken into account:
9. Percentage, 50.
10. Amount, $2,859.32.

Total net long-term capital gain or loss (enter in linet 2, column 3, of summary below) $2,859.32

Summary of Capital Gains and Losses

1. Classification, Total net short-term capital gain *$5,718.64

*Column 5. Total net gain taken into account in columns 2, 3, and 4 of this summary.

Tahola, Wash.
Sept. 10, 1947.

Collector of Internal Revenue,
Tacoma, Wash.

Explanation of Delinquency
Determination of Tax Liability

Reference is made to the attached Income Tax return filed for myself for the calendar year 1943.

We plead that no Ad Valorem penalty be imposed for the reason that the delinquency is due to the awaiting of the Circuit Court's decision in the Scott vs. Commissioner case, which was being liti-

In the District Court of the United States for the Western District of Washington, Southern Division.

No. 1101

HORTON CAPOEMAN and EMMA CAPOEMAN, His Wife,

Plaintiffs,

vs.

UNITED STATES OF AMERICA and CLARK SQUIRE, Collector of Internal Revenue for the District of Washington,

Defendants.

COMPLAINT

Come now plaintiffs and for cause of action against defendants allege:

I.

That plaintiffs are and during the times herein mentioned were husband and wife and are full-blood Quinaielt Indians born on the Quinaielt Indian Reservation within the United States, and at all times were and are duly enrolled and recognized members of the Quinaielt Indian Tribe of the Quinaielt Indian Reservation and are citizens of the United States and residents of the State of Washington, and plaintiffs have resided on said Quinaielt Indian Reservation in the State of Washington continuously since birth, and at all times have affiliated with said Quinaielt Tribe of Indians

gated to determine the taxability on the sale of timber by members of the Quineault Tribe of the State of Washington, which was recently handed down in favor of the government, and since the United States received and held the funds arising from the sale of said timber, as Trustee, and had control of the disbursal of the same, the duty devolved on it, so acting in such fiduciary capacity, to file said return.

Determination of Tax Liability

The timber sold giving rise to the income referred to herein was on lands within the Quineault Indian Reservation allotted to taxpayers, full blood, Indians, members of the Quineault Tribe, and in this instance the sale was conducted by the Department of the Interior, of the United States, Bureau of Indian Affairs, acting through the Local Indian Agent, having jurisdiction of said Quineault Indian Reservation, who received the money and after making certain deductions therefrom to defray administration expenses, credited the balance of the proceeds to taxpayers account, but some was held in trust by the United States.

The contract of sale provides for payment of timber as it was cut. Out of a total of $15,080.80 finally realized from sale of all the timber on the allotment, only $8,418.28 in value was cut and paid for in 1943. This amount is therefore being reported for the year as sold, since the balance was paid in subsequent years as the timber was cut.

Of said sum of $8,418.28 so paid on account of said sale of timber, $1,537.00 thereof was disbursed

and are, and at all times herein mentioned were under the jurisdiction, supervision and control of the defendant United States acting by and through the Superintendent of the Taholah Indian Agency at Hoquiam, Gray's Harbor County, Washington, and are and at all times mentioned in this complaint were classified as non-competent Indians and wards of the Government of the United States.

II.

That defendant Clark Squire is and at times herein mentioned was Collector of Internal Revenue of the United States for the Collection District of Washington, residing at Tacoma, Pierce County, Washington, within the above entitled District.

III.

That this action is one under the Revenue Act of 1921 of the United States for the recovery of income taxes erroneously and illegally assessed against and collected from plaintiffs in violation of certain treaties entered into between the United States of America and certain Indian Tribes and in violation of the laws of the United States.

IV.

That on July 1, 1855, and January 25, 1856, Articles of Agreement and Convention were made and concluded by and between the United States of America acting through its duly authorized representatives and the Quinaielt and other bands or tribes of Indians acting through their chiefs and delegates, whereby the members of said Indian

Tribes ceded, relinquished and conveyed to the United States their respective rights, title and interest in and to certain lands and country then occupied by them described in said Articles of Agreement and Convention of July 1, 1855 (12 Stat. 971), which said Treaty is a public document embraced in an Act of Congress and is hereby referred to and made a part hereof by reference. That said Treaty was ratified by the United States on March 8, 1859 and duly proclaimed on April 15, 1859, by the terms of which said Treaty there was secured to members of the Quinaielt Tribe Band of Indians, their posterity and successors, a reservation of lands sufficient for their needs, which said Reservation was later designated by the United States and thereafter surveyed and set apart for the exclusive use of the members of said Quinaielt Tribe of Indians, their posterity and successors in interest, and that said Indian Reservation so set aside has been the home and abiding place of the members of the Quinaielt Tribe of Indians, including plaintiffs. That plaintiffs are the posterity of and successors in interest of the members of said Quinaielt Tribe of Indians who participated in the making of said Treaty.

V.

That in pursuance of said treaties and laws of Congress enacted in pursuance thereof, there was allotted to plaintiffs the following described real property within Quinaielt Indian Reservation, Grays Harbor County, Washington, to wit:

Lot four of Section twenty-five and the southwest quarter of the southwest quarter of Section twenty-four in Township twenty-two north of Range twelve west of the Willamette Meridian, Washington, containing ninety-three and twenty-five-hundredths acres;

and that a trust patent therefor was duly issued to plaintiff Horton Capoeman on the 1st day of October, 1907, a copy of which said trust patent is hereto attached marked Exhibit "A" and made a part of this complaint by reference.

VI.

That according to the terms of said treaties and laws of Congress enacted in pursuance thereof, the lands embraced within said description above set forth, together with the standing timber thereon, consisting of coniferous-bearing trees from one hundred to several hundred years of age, is, and at all times in this complaint mentioned, was trust property under the sole supervision and control of the United States, and neither said land nor the timber growing thereon, which was and is a part of said real estate was or is subject to alienation by plaintiffs without the consent and approval first had of the United States.

VII.

That during the year 1943 a sale of a portion of plaintiff's allotment, consisting of certain timber growing and standing thereon was conducted by the Department of the Interior of the United States,

Bureau of Indian Affairs, acting through the local Indian Agency of the United States having jurisdiction of said Quinaielt Indian Reservation; that a contract of sale by said Agency was entered into providing for payment of timber as it was cut; that out of a total of $15,080.80 to be finally realized from the sale of said timber from said allotment but $8,418.28 was paid during said year, and the balance of said agreed purchase price was paid during subsequent years; that of said sum of $8,418.28 so paid on account of said sale of timber, $1,537.00 thereof was disbursed to plaintiffs during the year 1943, and the balance of said sum, to wit, $6,878.00 was held in trust and maintained in an account to the credit of the United States, subject only to withdrawal by plaintiffs by and with the consent of said United States Indian Agency and the Department of Interior officials of the United States.

VIII.

That plaintiffs' only entire income during the calendar year 1943, other than certain monies paid to plaintiffs Horton Capoeman as a member of the Armed Forces of the United States, consisted of the proceeds from the sale of said timber, being a portion of plaintiffs' trust allotment above described; that all of said monies were and are a part of an instrumentality of the government of the United States to effect a governmental purpose and means aimed to bring plaintiffs finally to a state of competency and independence.

IX.

That plaintiffs' status and condition at present and at all times in this complaint mentioned were such that it was necessary and proper, and is now necessary and proper, that the same be used and employed, without deduction, to the proper maintenance and support of plaintiffs.

X.

That said Articles of Agreement or Treaty of July 1, 1855 provides in substance (Article II) that no white man shall be permitted to reside on said Quinaielt Indian Reservation without permission of the Tribe and of the Superintendent of Indian Affairs and Indian Agent, and plaintiffs state the fact to be that in case Federal income taxes are imposed on plaintiffs and on other members of the Quinaielt and Quileute Tribes of Indians similarly situated on account of the income from the sale of trust property, or any part thereof, that it will ultimately result in the distrainf and impounding of said trust property and in the sale of said allotments and lands within said Indian Reservation to white men in violation of the contract rights of plaintiffs under said trust patent Exhibit "A," and in violation of the rights vouchsafed and secured to plaintiffs and the other members of said Indian Tribes similarly situated under said Treaties of July 1, 1855 and January 25, 1856, and in violation of their rights under Amendments V and XIV of the Constitution of the United States.

XI.

That at the times of the making of said Treaties of July 1, 1855 and January 25, 1856 and at the time of the issuance of said Patent, Exhibit "A," on October 1, 1907, plaintiffs and their ancestors, all of whom were Tribal Indians, members of the Quinaielt Indian Tribe, were by law exempt from taxation, and their Reservations, estate, and allotments were held in trust by the United States and were at all times and are now exempt from levy, distraint, or sale for taxes, and at all times were and are exempt from attachment, garnishment, or sale under execution, all of which was known to the respective parties to said Treaties and to the parties to said Patent, Exhibit "A," and said Treaties were made and said Patent, Exhibit "A," was issued subject to and in reliance on said conditions.

XII.

That the trust created by said conditional Patent, Exhibit "A" and, all and singularly, the provisions and conditions thereof were prior to October 1, 1932 extended for an indefinite period. That said trust is still in full force and effect.

XIII.

That the lands hereinabove described were, and parts thereof are still, heavily timbered; that the principal value thereof was in the timber growing thereon; that the cost of reducing said lands to an arable condition fit for grazing or crop production is prohibitive.

XIV.

That in compliance with the demands of defendant Clark Squire as such Collector of Internal Revenue, plaintiffs filed an income tax return for the year 1943, a copy of which said income tax return is marked Exhibit "B" and made a part of this complaint by reference, in pursuance of which said income tax return said defendant Clark Squire as such Collector wrongfully collected and received from plaintiffs on October 10, 1947, the sum of $298.11 and $64.09 accrued interest, as set forth in said return, Exhibit "B."

XV.

That subsequent to the payment by plaintiffs of said income tax so wrongfully exacted and received from plaintiffs by said defendant Clark Squire as such Collector, plaintiffs on January 12th, 1948, filed a claim for refund with said Clark Squire as such Collector of Internal Revenue, a copy of which said claim for refund of said payment is attached hereto marked Exhibit "C" and made a part of this complaint by reference.

XVI.

That on January 21, 1948, defendants denied said claim for refund by denial in writing, a copy of which said denial is marked Exhibit "D" and made a part hereof by reference.

XVII.

That in arriving at said tax so assessed against plaintiffs and receiving payment thereof, and in

consisted of the proceeds from the sale of said timber, being a portion of claimants' trust allotment above described; that all of said monies was part of an instrumentality of the government of the United States to effect a governmental purpose and means aimed to bring claimants finally to a state of competency and independence. That claimants' status and condition at present and at all times in this claim mentioned were such that it was necessary and proper, and is now necessary and proper, that the same be used and employed, without deduction, to the proper maintenance and support of claimants.

That said Articles of Agreement or Treaty of July 1, 1855, provides in substance (Article II) that no white man shall be permitted to reside on said Quinaielt Indian Reservation without permission of the Tribe and of the Superintendent of Indian Affairs and Indian Agent, and claimants state the fact to be that in case a Federal Income tax is imposed on claimants and other members of said tribe similarly situated, that it will ultimately result in the sale of claimants' right and interest to said allotment and the like rights and interest of other members of said Quinaielt Tribe of Indians similarly situated, to white men, in violation of the terms and provisions of said Treaty, and in violation of the terms of said Patent (Exhibit A) attached hereto. That the imposition of a Federal Income Tax by the United States on the proceeds of a sale of said timber, which is a part and parcel of claimants' allotment, is not authorized by the

refusing to allow said claim of refund, defendants erroneously and wrongfully concluded and determined that the income of plaintiffs for the year 1943 arising from the sale of part of their said allotment, as hereinbefore alleged, was subject to the payment of Federal income taxes.

XVIII.

That there is now due and owing plaintiffs by Defendants the sum of $362.20, with interest thereon at the legal rate from October 10, 1947.

XIX.

In the alternative and in the event that the court should hold that said income of plaintiffs is subject to imposition of income taxes, then plaintiffs allege that defendants are now estopped from collecting interest or penalties thereon for the reason that the United States of America held and controlled said income in a Fiduciary capacity and any duty to make an income tax return and pay said tax devolves upon the United States as such Fiduciary.

XX.

That for a period of years prior to the year 1943 the Commissioner of Internal Revenue of the United States and his predecessors in office in many official and non-official opinions, to which plaintiffs as well as defendants had access, ruled that income of the nature described herein received by Tribal Indians was not subject to imposition of income taxes under the laws of the United States, which

Income Tax laws or various revenue laws or acts of the United States, and is contrary to the letter and spirit of said treaties, and is contrary to the understanding and intention of the members of said Quinaielt Tribe of Indians and their Chiefs, headmen and delegates who entered into said Articles of Agreement and treaties hereinabove referred to, and that under the Constitution and laws of the United States said proceeds of sale of said timber are exempt from the payment of income taxes.

That the trust created by said conditional patent exhibit "A" and all and singular the conditions thereof was prior to October 1st, 1932, extended by the United States for an indefinite period and the same is still in full force and effect.

EXHIBIT "D"

Treasury Department
Internal Revenue Service
Tacoma 2, Wash.

January 21, 1948.

In replying refer to
IT:OGI:se
10-200153-47
Mr. Horton Capoeman,
c/o F. L. Hohensinner,
525 Perkins Building,
Tacoma, Washington.

Dear Mr. Capoeman:

Reference is made to your claim for refund of 1943 income tax in the amount of $298.11 which was

official and non-official opinions were communicated to plaintiff and to the various Indian Agents appointed by the office of Indian Affairs to supervise the affairs of the Indian Tribes, including the Quinaielt Tribe, who advised them regarding their non-liability for the payment of income taxes. That previous to the date of the demand for payment of income taxes hereinbefore referred to, neither plaintiffs nor other members of the Quinaielt Tribe of Indians, were advised that the Commissioner of Internal Revenue had reversed his position with respect to the payment of income taxes by Tribal Indians, or that the members of said Tribe would be required to file income tax returns and pay Federal income taxes under the laws of the United States. That in equity and fair dealing Defendants should now be estopped from collecting interest or penalties on account of the non-payment of said Federal income taxes.

XXI.

That no assignment or transfer of plaintiff's said claim, or any part thereof, or interest therein, has been made, and that plaintiffs are justly entitled to the amount herein claimed from the United States after allowing all just credits and offsets; that plaintiffs have at all times borne true allegiance to the Government of the United States, and neither of them have at any time or in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government, and that plaintiffs, and each of them, believe the facts as stated in the foregoing Complaint to be true.

Wherefore, plaintiffs pray that it be adjudged and decreed that they were and are exempt from the payment of Federal income taxes on account of income arising from the sale of the timber referred to herein for the year 1943, and that they have and recover from defendants the sum of $362.20, with interest thereon at the legal rate from October 10, 1947; and that the court grant such other, further or additional relief in the premises as the nature of the case may afford and equity demand.

/s/ CHARLES T. PETERSON,

/s/ WENDELL W. DUNCAN,

Attorneys for Plaintiffs.

EXHIBIT "A"

4-182b-ty

The United States of America

To all to whom these presents shall come, greeting:

Whereas, There has been deposited in the General Land Office of the United States a schedule of allotments approved by the Secretary of the Interior June 21, 1907, whereby it appears that Horton Capoeman; an Indian of the Quinaielt tribe or band, has been allotted the following described land:

The Lot four of Section twenty-five and the southwest quarter of the southwest quarter of Section twenty-four in Township twenty-two north of Range twelve west of the Willamette Meridian, Washington, containing ninety-three and twenty-five-hundredths acres;

Now know ye, That the United States of America, in consideration of the premises, has allotted, and by these presents does allot, unto the said Horton Capoeman, the land above described, and hereby declares that it does and will hold the land thus allotted (subject to all statutory provisions and restrictions) for the period of twenty-five years, in trust for the sole use and benefit of the said Indian, and that at the expiration of said period the United States will convey the same by patent to said Indian, in fee, discharged of said trust and free of all charge or incumbrance whatsoever, if the said Indian does not die before the expiration of the trust period; but in the event said Indian does die before the expiration of that period this patent and the allotment upon which it is based shall be canceled, and the said land shall revert to the United States and be thereafter disposed of in the manner prescribed by law: Provided, That the President of the United States may, in his discretion, extend said period.

In testimony whereof, I, Theodore Roosevelt, President of the United States of America, have caused these letters to be made Patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand, at the City of Washington, the first day of October, in the year of our Lord one thousand nine hundred and seven and of

the Independence of the United States the one-hundred and thirty-second.

By the President:

/s/ THEODORE ROOSEVELT,

By /s/ F. M. McKEAN,
Secretary.

[Seal] /s/ H. A. SANFORD,
Recorder of the General
Land Office.

Recorded Miscellaneous vol. 663 Page 247.

EXHIBIT B

Form 1040—Treasury Dept.—Internal Revenue Service Page 1

UNITED STATES 1943
INDIVIDUAL INCOME AND VICTORY TAX RETURN

For Calendar Year 1943
or fiscal year beginning ....., 1943, and ending ....., 1944

Horton Capoeman and Emma
Tahola, Washington

Occupation: Restricted Indian.

Computation of Net Income
Income

1. Salary, Wages, and Compensation for Personal Services:
Employer's Name, U.S. Army.

	Column 1 Income Tax Net Income	Column 2 Victory Tax Net Income
City and State, Various	$ 600.00	Exempt
5. (a) Net gain (or loss) from sale or exchange of capital assets. (From Schedule B)	2,859.32	
9. Total income in items 1 to 9	$2,859.32	

to taxpayers during the year 1943; the balance of $6,880.78 is held in trust in an individual account of said taxpayer, subject to withdrawal by said taxpayer with the consent of the Indian Agency and Department of Interior Officials.

The timber was acquired without actual cost, pursuant to a treaty negotiated between the United States and the Quineault Indian Tribe in exchange for vast areas of land ceded to the government. The Fair Market Value as of March 31, 1913, was used as a basis, which value was determined and secured from Mr. Lester McKeever, veteran Forest Ranger, Taholah Indian Agency, Hoquiam, Washington. Costs of administration by the Indian Agency were deducted as an expense of sale.

HORTON CAPOEMAN.

EXHIBIT C

Form 843
Treasury Department
Internal Revenue Service
(Revised Jan. 1946)

Claim

To be filed with the collector where assessment was made or tax paid

Collector's Stamp: (Date received) [Blank]

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse side.

☒ Refund of Tax Illegally Collected.
☐ Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.
☐ Abatement of Tax Assessed (not applicable to estate, gift, or income taxes).

State of Washington,
County of Grays Harbor—ss.

Name of taxpayer or purchaser of stamps: Horton Capoeman and Emma.
Business address: Tahola, Wash.
Residence: Tahola, Wash.

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed: Washington.
2. Period (if for income tax, make separate form for each taxable year) from Jan. 1, 1943 to Dec. 31, 1943.
3. Character of assessment or tax: Income Tax.
4. Amount of assessment, $298.11; dates of payment: Sept. 12, 1947.
5. Date stamps were purchased from the Government .....
6. Amount to be refunded $298.11
7. Amount to be abated (not applicable to income gift, or estate taxes) ..... $ .....

8. The time within which this claim may be legally filed expires, under section ..... of ..... (Revenue Act or Internal Revenue Code) on ....., 19...

The deponent verily believes that this claim should be allowed for the following reasons:

It is contended that payment or exaction of payment of Income Tax on income derived from the sale of timber upon the land of the taxpayer, a resident of the Quinault Tribal reservation, and within the boundaries of which is situated the timber in question is unlawful. For this and other reasons contained in the attached statement refund of the tax which has been paid is hereby prayed for.

(Attach letter-size sheets if space is not sufficient)

/s/ .....,

.....

Sworn to and subscribed before me this 8th day of January, 1948.

.....,

(Signature of officer administering oath)

That claimants are and at all times in this claim mentioned were full-blood Quinaielt Indians born on the Quinaielt Indian Reservation within the United States and are duly enrolled, allotted and recognized members of the Quinaielt Indian Tribe of the Quinaielt Indian Reservation in the State of Washington and have resided on said Reservation

continuously since their respective births, save and except an absence therefrom by Horton Capoeman to serve with the armed forces of the United States in World War II; that they affiliate with said Tribe of Indians and are under the jurisdiction, supervision and control of the United States acting by and through the Superintendent of the Taholah Indian Agency at Hoquiam, Grays Harbor County, Washington, and are and at all times mentioned in this claim were classified as non-competent wards of the Government of the United States;

That on July 1, 1855 and January 25, 1856, Articles of Agreement and Convention were made and concluded by and between the United States of America acting through its duly authorized representatives and the Quinaielt and other bands or tribes of Indians acting through their chiefs and delegates, whereby the members of said Indian Tribes ceded, relinquished and conveyed to the United States their respective rights, title and interest in and to certain lands and country then occupied by them described in said Articles of Agreement and Convention of July 1, 1855 (12 Stat. 971), which said Treaty is a public document embraced in an Act of Congress and is hereby referred to and made a part hereof by reference. That said Treaty was ratified by the United States on March 8, 1859 and duly proclaimed on April 15, 1859, by the terms of which said Treaty there was secured to members of the Quinaielt Tribe Band of Indians, their posterity and successors, a reservation of lands sufficient for their needs, which said Reservation

was later designated by the United States and thereafter surveyed and set apart for the exclusive use of the members of said Quinaielt Tribe of Indians, their posterity and successors in interest, and that said Indian Reservation so set aside has been the home and abiding place of the members of the Quinaielt Tribe of Indians, including claimants. That claimants are the posterity of and successors in interest of the members of said Quinaielt Tribe of Indians who participated in the making of said Treaty.

That in pursuance of said treaties and laws of Congress enacted in pursuance thereof, there was allotted to claimants the following described real property within Quinaielt Indian Reservation, Grays Harbor County, Washington, to wit:

Lot four of Section twenty-five and the southwest quarter of the southwest quarter of Section twenty-four in Township twenty-two north of Range twelve west of the Willamette Meridian, Washington, containing ninety-three and twenty-five-hundredths acres; containing ..... acres of land, and that a trust patent therefor was duly issued to claimant Horton Capoeman on the 1st day of October, 1907, a copy of which said trust patent is hereto attached marked Exhibit "A" and made a part of this claim by reference. That according to the terms of said treaties and laws of Congress enacted in pursuance thereof, the lands embraced within said description above set forth, together with the standing timber thereon, consisting of coniferous-bearing trees from one hundred to several hundred years of age, is, and at all times in

this claim mentioned, was trust property under the sole supervision and control of the United States, and neither said land nor the timber growing thereon, which was and is a part of said real estate is subject to voluntary alienation by claimants without the consent and approval first had of the United States. That during the year 1943 a sale of a portion of claimants' allotment, consisting of certain timber growing and standing thereon was conducted by the Department of the Interior of the United States, Bureau of Indian Affairs, acting through the local Indian Agency of the United States having jurisdiction of said Quinaielt Indian Reservation; that a contract of sale by said Agency was entered into providing for payment of timber as it was cut; that out of a total of $15,080.80 to be finally realized from the sale of said timber from said allotment but $8,418.28 was paid during said year, and the balance of said agreed purchase price was paid during subsequent years; that of said sum of $8,418.28 so paid on account of said sale of timber, $1,537.00 thereof was disbursed to claimants during the year 1943, and the balance of said sum, to wit, $6,878.00 was held in trust and maintained in an account to the credit of the United States, subject only to withdrawal by claimants by and with the consent of said United States Indian Agency and the Department of Interior officials of the United States. That claimants' only entire income during the calendar year 1943, other than certain monies paid to claimant Horton Capoeman as a member of the Armed Forces of the United States,

received in this office January 12, 1948. In your claim you indicate that income derived from the sale of timber upon your allotted land situated within the boundaries of the Quinailet Reservation is not taxable.

According to Tax Court Decision (Madeline E. Mounts Scott #8 TC 126 (No. 13)) income from the sale of timber from allotted land on an Indian Reservation is taxable. Therefore, your claim mentioned above is denied. If you do not concur with the Tax Court Decision, however, you may file a formal protest duly signed which we shall forward to the Commissioner of Internal Revenue for consideration.

Should further correspondence become necessary, kindly refer to the symbols and number appearing in the upper left-hand corner of this letter.

Very truly yours,

CLARK SQUIRE,
COLLECTOR,

By /s/ F. I. WOODWORTH,
Chief, Income Tax Division.

Duly verified.

[Endorsed]: Filed February 27, 1948.

[Title of District Court and Cause.]

ORDER DISMISSING UNITED STATES OF AMERICA

This matter having come on regularly for hearing before the above-entitled court; and it appearing that the plaintiff has elected to proceed against Clark Squire, Collector of Internal Revenue for the District of Washington; and it further appearing that the parties hereto have signed and filed a stipulation providing that the United States of America may be dismissed without prejudice and without costs, and the court being fully advised in the premises, now, therefore,

It Is Ordered, Adjudged and Decreed that the United States of America defendant in the above-entitled action, be and it hereby is dismissed without prejudice and without costs.

Done in open court this 10th day of August, 1949.

/s/ CHARLES H. LEAVY,
United States District Judge.

Approved as to Form:

/s/ GUY A. B. DOVELL,
Of Attorneys for Defendants.

Presented by:

/s/ W. W. DUNCAN,
Of Attorneys for Plaintiff.

[Endorsed]: Filed August 10, 1949.

[Title of District Court and Cause.]

ANSWER

Comes now the defendant, Clark Squire, Collector of Internal Revenue for the Internal Revenue Collection District of Washington by his attorney, J. Charles Dennis, United States Attorney for the Western District of Washington, the defendant United States of America having heretofore been dismissed from this cause, and in answer to plaintiffs' complaint, states:

1. The averments of paragraph 1 are admitted.
2. The averments of paragraph 2 are admitted.
3. The averments of paragraph 3 are denied.
4. The averments of paragraph 4 are admitted.
5. The averments of paragraph 5 are admitted.
6. The averments of paragraph 6 are denied, except that it is admitted that under the terms of the Treaties with the Quinaielt Indians, and Laws of Congress enacted in pursuance thereof, the land embraced within the description set forth in Complaint, paragraph V, was trust property under the joint control of the United States and the plaintiffs, and that neither the land, nor the timber growing thereon, was subject to alienation by plaintiffs without the consent and approval of the United States.
7. The averments of paragraph 7 are denied, except that it is admitted that during the year 1943 certain standing timber on plaintiffs' allotment was cut and sold under a contract entered into by the Bureau of Indian Affairs of Department of the In-

terior of the United States, with the approval of the plaintiffs; that the contract of sale provided for payment of timber after it was cut and sold; that out of a total of $15,080.80 ultimately realized from the sale of cut timber from said allotted land, only $8,418.28 was cut, sold and paid for during 1943; that of said sum of $8,418.28, the amount of $1,537 was disbursed to plaintiffs during the year 1943, and the balance of said sum, to wit, $6,878.00, was held in trust by the United States and maintained in an account for the benefit of the plaintiffs, subject to withdrawal by the plaintiffs for their own use and benefit by, and with the consent of, certain officials of the Department of the Interior of the United States.

8. The averments of paragraph 8 are denied, except that it is admitted that plaintiffs' entire income during the calendar year 1943, other than certain moneys paid to plaintiff Horton Capoeman as a member of the armed forces of the United States, consisted of the proceeds from the sale of timber cut from his allotment.

9. The averments of paragraph 9 are denied.

10. The averments of paragraph 10 are denied.

11. The averments of paragraph 11 are denied.

12. The averments of paragraph 12 are admitted.

13. The averments of paragraph 13 are denied, except that it is admitted that the lands allotted to plaintiffs and described in paragraph V of the complaint were heavily timbered, and that said lands are generally unsuitable for agricultural purposes but are most adaptable for timber cultural purposes.

14. The averments of paragraph 14 are admitted, except that it is denied that any amount of money was wrongfully collected by the defendant from the plaintiffs.

15. The averments of paragraph 15 are denied, except that it is admitted that a claim for refund was filed with the defendant Squire on January 12, 1948, and that Complaint, Exhibit C, is a copy thereof.

16. The averments of paragraph 16 are denied, except that it is admitted that on January 21, 1948, the defendant Squire transmitted a letter to plaintiff Horton Capoeman, a copy of which is attached to the complaint as Exhibit D.

17. The averments of paragraph 17 are denied.

18. The averments of paragraph 18 are denied.

19. The averments of paragraph 19 are denied.

20. The averments of paragraph 20 are denied.

21. The averments of paragraph 21 are admitted, except that it is denied that plaintiffs are entitled to recover any amount herein.

/s/ J. CHARLES DENNIS,
United States Attorney,

/s/ HARRY SAGER,
Asst. United States Attorney,

/s/ THOMAS R. WINTER,
Special Assistant to the Chief Counsel, Bureau of Internal Revenue, Attorneys for Defendant.

[Endorsed]: Filed August 26, 1949.

[Title of District Court and Cause.]

STIPULATION

It is hereby stipulated and agreed by and between the parties hereto by their respective counsel, that the following facts may be taken as true with the reservation that this stipulation shall be without prejudice to the right of either party to introduce other and further evidence not inconsistent with the facts herein stipulated, and subject to the right of either party to object to any fact herein stipulated on the ground that it is irrelevant and immaterial.

I.

That Horton Capoeman and Emma Capoeman are, and during all of the times herein mentioned were, husband and wife, and are full-blooded Quinaielt Indians, born on the Quinaielt Indian Reservation within the United States, and at all times herein mentioned were, and are, duly enrolled and recognized members of the Quinaielt Indian Tribe, Quinaielt Indian Reservation, Washington, and are citizens of the United States and residents of the State of Washington.

II.

That plaintiffs, Horton Capoeman and Emma Capoeman, are and at all times herein mentioned were under the jurisdiction, supervision and control of the United States, acting by and through the Superintendent of the Taholah Indian Agency, and are, and at all times herein mentioned were, classified as non-competent Indians and wards of the government of the United States.

III.

That the defendant, Clark Squire, is, and at all times material was, Collector of Internal Revenue of the United States for the collection district of Washington, residing at Tacoma, Pierce County, Washington, within the above-entitled district.

IV.

That on July 1, 1855, and January 25, 1856, Articles of Agreement and Convention were made and concluded by and between the United States of America acting through its duly authorized representatives and the Quinaielt and other bands or tribes of Indians acting through their chiefs and delegates, whereby the members of said Indian Tribes ceded, relinquished and conveyed to the United States their respective right, title and interest in and to certain lands and country then occupied by them described in said Articles of Agreement and Convention of July 1, 1855 (12 Stat. 971). That said Treaty was was ratified by the United States on March 8, 1859, and duly proclaimed on April 15, 1859, by the terms of which said Treaty there was secured to members of the Quinaielt Tribe Band of Indians, their posterity and successors, a reservation of lands sufficient for their needs, which said reservation was later designated by the United States and thereafter surveyed and set apart for the exclusive use of the members of said Quinaielt Tribe of Indians, their posterity and successors in interest, and that said Indian Reservation so set aside has been the home and abiding place of the members of

the Quinaielt Tribe of Indians, including plaintiffs. That plaintiffs are the posterity of and successors in interest of the members of said Quinaielt Tribe of Indians who participated in the making of said treaty.

V.

That Horton Capoeman, one of the plaintiffs, was allotted the following described real property within the Quinaielt Indian Reservation, Grays Harbor, Washington:

> Lot four of Section twenty-five and the southwest quarter of the southwest quarter of section twenty-four in Township twenty-two north of range twelve west of the Willamette Meridian, Washington, containing ninety-three and twenty-five hundredths acres;

under authority of the Quinaielt Treaty of July 1, 1855 (12 Stat. 971), and the General Allotment Act of February 22, 1887 (24 Stat. 388), and Acts of Congress supplementary thereto or amendatory thereof, and that a trust patent therefor was duly issued to Horton Capoeman on October 1, 1907, copy of which is hereto attached, made a part hereof and marked Exhibit "A."

VI.

That fee title to the above-described land is held by the United States in trust for Horton Capoeman.

VII.

That the lands hereinabove described, together with the standing timber, consisting of coniferous-bearing trees, are, and at all times herein mentioned,

were trust property under the joint supervision and control of the United States and Horton Capoeman, and neither said land nor the timber growing thereon was, or is, subject to alienation by the plaintiff, Horton Capoeman, without the consent and approval first had of the United States.

VIII.

That during the year 1943 certain standing timber on plaintiffs' allotment was cut and sold under a contract entered into by the Bureau of Indian Affairs of Department of the Interior of the United States, with the approval of the plaintiffs; that the contract of sale provided for payment of timber after it was cut and sold; that out of a total of $15,080.80 ultimately realized from the sale of cut timber from said allotted land, only $8,418.28 was cut, sold and paid for during 1943; that of said sum of $8,418.28, the amount of $1,537 was disbursed to plaintiffs during the year 1943 and the balance of said sum, to wit, $6,878.00 (an unaccounted for expenditure of $3.28), was placed in trust by the United States and maintained in an account for the benefit of the plaintiffs, subject to withdrawal solely by or for the plaintiffs for their use and benefit by and with the consent of the appropriate officials of the Department of the Interior of the United States.

IX.

That the plaintiffs, Horton and Emma Capoeman, his wife, filed a joint income tax return for the year 1943, a copy of which said income tax return,

marked Exhibit "B" and made a part hereof by reference; in pursuance of which said income tax return plaintiffs, on October 10, 1947, paid to the defendant, Clark Squire, as Collector of Internal Revenue for the District of Washington, the sum of $298.11 and $64.09 accrued interest, as set forth in said return, Exhibit "B."

X.

That subsequent to the payment by plaintiffs of said income tax, plaintiffs, on January 12, 1948, filed a claim for refund with the said Clark Squire as such Collector of Internal Revenue, a copy of which said claim for refund of said payment is attached hereto marked Exhibit "C" and made a part of this complaint by reference.

XI.

That on January 21, 1948, defendant denied said claim for refund by denial in writing, copy of which said denial is marked Exhibit "D" and made a part hereof by reference.

Signed and dated this 9th day of November, 1951.

/s/ KENNETH R. L. SIMMONS,
Attorney for Plaintiffs.

/s/ J. CHARLES DENNIS,
United States Attorney.

/s/ THOMAS R. WINTER,
Special Assistant to the Chief Counsel, Bureau of Internal Revenue, Attorneys for Defendants.

[Endorsed]: Filed November 14, 1951.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Now, on this .... day of ....., 1952, the Court, after considering the stipulation of facts, admissions of the parties, and the briefs, makes the following findings of fact:

I.

The Court has jurisdiction of the parties and of the subject matter.

II.

The defendant, Clark Squire, at all pertinent times herein was the duly commissioned, qualified and acting Collector of Internal Revenue of the United States for the District of Washington.

III.

That Horton Capoeman and Emma Capoeman, his wife, plaintiffs herein are citizens of the United States and non-competent Indian wards of the United States, under the supervision and control of the Taholah Indian Agency. That they are full-blood Quinaielt Indians, born and residing upon the Quinaielt Indian Reservation in the State of Washington.

IV.

That under the provisions of the Quinaielt Treaty with the United States, dated July 1, 1855, and January 25, 1856 (12 Stat. 971), Quinaielt Indian tribal lands were transferred to the United States.

but there was reserved therefrom and set apart for the exclusive use of the members of the Quinaielt Tribe an area designated in accordance with the terms of the treaty. That on October 1, 1907, pursuant to the terms of the treaty and the General Allotment Act of February 8, 1887 (24 Stat. 388), a trust patent was issued to Horton Capoeman, one of the plaintiffs herein, for approximately ninety-three acres of tribal land within the Quinaielt Reservation, described as follows:

> Lot Four Section Twenty-five and the southwest quarter of the southwest quarter of Section Twenty-four in Township Twenty-two north of Range Twelve west of the Willamette Meridian, Washington, containing ninety-three and twenty-five hundredths acres.

That the fee title to this land was and still is held by the United States in trust for Horton Capoeman and said land was not and still is not subject to alienation or encumbrance by the plaintiffs, except with the consent and approval of the proper agents of the United States, which has not yet been given to such alienation.

That during the year 1943, pursuant to a contract of sale entered into by the Bureau of Indian Affairs of the United States Department of the Interior providing for the cutting and sale of timber from plaintiffs' said lands, $8,418.28 worth of timber was cut, sold and paid for. Of the $8,418.28 received, $1,537.00 was distributed to plaintiffs and the balance of $6,878.00 (with $3.28 unaccounted for) was

placed in trust by the United States and maintained, subject to withdrawal solely by or for their use and benefit, in an account for the plaintiffs.

VI.

That plaintiffs filed a joint income tax return for the calendar year 1943, reporting long-term capital gain from the sale of the timber in that year. That the return was filed on October 10, 1947, and on that date plaintiffs paid the taxes shown due.

VII.

That on January 2, 1948, plaintiffs filed a claim for refund of the taxes paid and contended in their return that their income derived from the sale of timber from the allotted land was not subject to federal income taxation because such taxation would be in violation of the provisions of the Quinaielt treaty and of the trust patent.

VIII.

That the claim for refund was denied by the Bureau of Internal Revenue on January 21, 1948, and this action was instituted on March 3, 1948.

IX.

That none of the income involved was paid directly to these plaintiffs but all was paid into the Taholah Indian Agency at Taholah, Washington, and each disbursement therefrom was made under the supervision and control of the Department of the Interior. All such restricted funds are held by the United States Government for the sole use

and benefit of the individual Indian owner and all receipts or expenditures for each Indian are credited or charged to his individual account.

X.

That all income involved in this controversy is derived directly from the land which was allotted under the provisions of the Quinaielt Treaty of July 1, 1855, and the General Allotment Act of February 8, 1887.

Conclusions of Law

I.

That this Court has jurisdiction of this cause as it is one of the classes of cases provided for in 28 U.S.C.A. Secs. 1340-1353 (26 U.S.C.A. Sec. 3772 having been complied with).

II.

That the moneys derived from the sale of the timber as income received by the United States is money held in trust by the United States for these Indian wards and is part and parcel of the corpus of a trust-estate which the government has held since the Quinaielt treaty of 1855.

III.

That prior to the Quinaielt treaty of 1855 the Quinaielt Indians had rights of occupancy in a vast territory which was ceded to the United States in return for protection and tutelage, with the express understanding that title would be reserved to a tract

of land within the ceded area for the use and benefit of the Quinaielt Indians—legal title to which would be held by the United States as trustee for the Quinaielts.

IV.

That the General Allotment Act continued the relationship of guardian and ward and provided for individual allotments to members of the Quinaielt Tribe to be held in trust by the United States, which trust period has been indefinitely extended by Acts of Congress and Executive Orders of the President of the United States.

V.

That, as an obligation of the trustee, the United States of America the United States has no power to levy a duty or impost or charge upon the lands over which it has plenary power by virtue of ownership and sovereignty. That the State of Washington likewise can levy no taxes on the whole or any part or parcel thereof.

VI.

That only after the issuance of patent in fee by the United States to said lands, which must be authorized by the Indian in order to burden him with the weight of the obligation, the national and state governments are empowered to tax this land and its increments as the real property of any other citizen.

VII.

That the lands herein involved cannot be treated as "capital" or as a "capital asset" until the land

is thus conveyed, for by doing otherwise the General Allotment Act of February 8, 1887, would be violated by placing a "charge of incumbrance" on this land.

VIII.

That the State of Washington likewise cannot collect back taxes upon land before the date of conveyance in fee to the Indians.

IX.

That the federal government has no right upon a sale by an Indian, immediately after a patent to him in fee, to tax the difference in value between the date of the treaty, or even March 1, 1913, and the date of sale as a capital asset.

X.

That the sale of timber which is involved in this case is the sale of part of the realty, as timber, until severed, is a part of the land and the United States cannot tax a part or the whole of said lands for the reason that it would be in violation of its trust and the guarantee stated in the General Allotment Act of February 8, 1887.

XI.

That this tax exemption once granted by Congress is a vested property right which cannot constitutionally be impaired by subsequent legislation.

XII.

That the tax was erroneously, wrongfully and illegally collected and received by the defendant.

XIII.

That plaintiffs are entitled to recover from the defendant the sum of $362.20 with interest thereon at 6% from October 10, 1947, together with the costs of this action.

/s/ JAMES ALGER FEE,
United States District Judge.

Receipt of copy acknowledged.
Lodged September 16, 1952.
[Endorsed]: Filed October 13, 1952.

In the District Court of the United States for the Western District of Washington, Southern Division.

No. 1101-Civil

HORTON CAPOEMAN and EMMA CAPOEMAN, His Wife,

Plaintiffs,

vs.

UNITED STATES OF AMERICA and CLARK SQUIRE, Collector of Internal Revenue for the District of Washington,

Defendants.

JUDGMENT

This cause came on for decision before the court sitting without a jury on the issues joined by the pleadings. A stipulation was executed between the parties on August 10, 1949, whereby the plaintiffs elected to proceed against Clark Squire, Collector of Internal Revenue for the District of Washington,

and further agreed that the defendant, the United States Attorney would be dismissed as a party defendant in said action without prejudice and without cost. A stipulation was consummated between the parties to the action, through their attorneys of record, as to the facts of the case with the reservation in either party to introduce other and further evidence not inconsistent with the facts as stipulated. No further evidence was introduced by either of the parties and following the submission of briefs by the respective parties the Court received the case for decision.

The Court being fully advised in the premises and having adopted herein its findings of fact and conclusions of law and having directed that judgment be entered in accordance therewith.

Now, therefore, by reason of the law and the findings aforesaid,

It Is Hereby Ordered, Adjudged and Decreed:

That the plaintiffs, Horton Capoeman and Emma Capoeman, his wife, the plaintiffs herein, recover from the defendant, Clark Squire, Collector of Internal Revenue for the District of Washington the sum of $362.20 with interest thereon at the rate of 6% from October 10, 1947, until paid and their costs of this action.

/s/ JAMES ALGER FEE,
United States District Judge.

Receipt of copy acknowledged.
Lodged September 16 1952.
[Endorsed]: Filed October 13, 1952.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Clark Squire, Collector of Internal Revenue for the District of Washington, defendant above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in the above-entitled action on October 13, 1952, in favor of the plaintiffs in said action and against the defendant, Clark Squire, Collector of Internal Revenue for the District of Washington, and from the whole thereof.

This appeal is taken on behalf of said defendant alone, the United States of America having prior

This appeal is taken on behalf of said defendant

Dated October 29, 1952.

/s/ J. CHARLES DENNIS,
United States Attorney,

/s/ GUY A. B. DOVELL,
Asst. United States Attorney,

/s/ THOMAS R. WINTER,
Special Assistant to the Chief Counsel, Bureau of Internal Revenue, Attorneys for Defendant Clark Squire, Collector of Internal Revenue for the District of Washington.

Address: 324 Federal Building, Tacoma 2, Washington.

Affidavit of mail attached.

[Endorsed]: Filed October 29, 1952.

[Title of District Court and Cause.]

CERTIFICATE OF PROBABLE CAUSE

I, James Alger Fee, one of the United States District Judges for the District of Oregon, sitting as United States District Judge for the Western District of Washington, Southern Division, in the above case, and in accordance with Title 28, U. S. Code, Sec. 2006, do hereby certify that the acts done by the defendant Clark Squire as Collector of Internal Revenue for the District of Washington in exacting and collecting the taxes for which judgment was entered in the above entitled action on October 13, 1952, in the sum of $362.20, with interest at the rate of 6% per annum from the 10th day of October, 1947, until paid, as set forth in said judgment, were done under the direction of the Commissioner of Internal Revenue in his then official capacity as such Collector of Internal Revenue, and that the said defendant had probable cause for his acts notwithstanding the fact that said tax and interest was erroneously collected and judgment has been rendered for refund thereon in this case.

Dated this ... day of ....., 1952.

/s/ JAMES ALGER FEE,
United States District Judge.

Presented by:

/s/ THOMAS R. WINTER,

11-14-52. Issued cert. copy to U. S. Atty.

[Endorsed]: Filed November 14, 1952.

[Title of District Court and Cause.]

STATEMENT OF POINTS TO BE RELIED UPON ON APPEAL

Comes now Clark Squire, the defendant-appellant in the above-entitled cause, and states that the points upon which he intends to rely in his appeal are that the income derived from the sale of cut timber from allotted lands in the hands of full-blood restricted Quinaielt Indians is subject to federal income taxes, no express tax exemption having been granted to such Indians either by agreements or legislation, and that such cutting and sale of timber from the allotted lands does not violate the trust under which the lands are held, and that the District Court erred in holding otherwise.

/s/ J. CHARLES DENNIS,
United States Attorney, Attorney for Defendant-Appellant.

[Endorsed]: Filed November 20, 1952.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD ON APPEAL

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the above entitled Court, do hereby certify that pursuant to the pro-

visions of Rule 75(o) of the Federal Rules of Civil Procedure as amended, and Subdivision 1 of Rule 11 as amended, of the United States Court of Appeals for the Ninth Circuit, I am transmitting herewith all of the original papers and pleadings filed in the above entitled cause, and the said papers and pleadings herewith transmitted constitute the Record on Appeal from that certain Judgment of the above-entitled Court, filed and entered on October 13, 1952, to the United States Court of Appeals for the Ninth Circuit, at San Francisco, California, and are identified as follows:

1. Complaint (filed Feb. 27, 1948)
2. Praecipe for Summons. (filed Feb. 27, 1948)
3. Marshal's Return of Service on Summons (filed Mar. 5, 1948)
4. Stipulation and Order Extending Time to Answer (filed May 6, 1948)
5. Motion to Require Election Between Parties Defendant (filed May 27, 1948)
6. Stipulation re Dismissal of United States (filed Aug. 10, 1948)
7. Order Dismissing United States (filed Aug. 10, 1948)
8. Answer (filed Aug. 26, 1949)
9. Substitution of Attorney (filed June 29, 1951)
10. Praecipe for Appearance of Kenneth R. L. Simmons as Attorney for Plaintiffs (filed July 5, 1951)
11. Stipulation of Facts (filed Nov. 14, 1951)
12. Opinion (filed Feb. 3, 1952)

13. Findings of Fact and Conclusions of Law (filed and entered Oct. 13, 1952).

14. Judgment (filed and entered Oct. 13, 1952)

15. Notice (defendant) of Appeal (filed October 29, 1952)

16. Certificate of Probable Cause (filed Nov. 14, 1952)

17. Designation (Defendant) of Record on Appeal (filed Nov. 20, 1952)

18. Statement of Points to be Relied Upon on Appeal (filed Nov. 20, 1952)

19. Affidavit of Mailing

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office on behalf of the defendant-appellant for preparation of the said Record on Appeal, to wit: notice of Appeal, $5.00, and that the said amount has not been paid to me for the reason that the appeal is being prosecuted by the United States.

In Witness Whereof I have hereunto set my hand and affixed the official seal of the said District Court, at Tacoma, Washington, this 1st day of December, 1952.

[Seal] MILLARD P. THOMAS,
Clerk;

By /s/ E. E. REDMAYNE,
Deputy.

[Endorsed]: No. 13640. United States Court of Appeals for the Ninth Circuit. Clark Squire, Collector of Internal Revenue for the District of Washington, Appellant vs. Horton Capoeman and Emma Capoeman, his wife, Appellees. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Southern Division.

Filed: December 4, 1952.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 13640

CLARK SQUIRE, Collector of Internal Revenue for the District of Washington,

Appellant,

vs.

HORTON CAPOEMAN and EMMA CAPOEMAN, His Wife,

Appellees.

APPELLANT'S STATEMENT OF POINTS AND DESIGNATION OF RECORD FOR PRINTING

Comes now appellant and, pursuant to Sub-division 6, Rule 19 of the Rules of the United States

Court of Appeals for the Ninth Circuit, herewith adopts the Statement of Points filed by appellant in the District Court upon which appellant intends to rely on appeal.

With the foregoing statement, the appellant designates as necessary for the consideration of this appeal the following portions of the original papers of record in this cause heretofore transmitted by the Clerk of the District Court to the United States Court of Appeals for the Ninth Circuit, material in the consideration of this case, to be printed for purposes of this appeal, to wit:

1. Complaint.
2. Order dismissing United States of America, dated August 10, 1949.
3. Answer of defendant.
4. Stipulation of Facts.
5. Findings of Fact and Conclusions of Law.
6. Judgment.
7. Notice of Appeal.
8. Certificate of Probable Cause.
9. Designation of Record on Appeal.
10. Statement of Points to be Relied upon on Appeal.
11. Appellant's Statement of Points and Designation of Record for Printing, with Proof of Service.

Dated this 9th day of December, 1952.

/s/ J. CHARLES DENNIS,
United States Attorney.

/s/ GUY A. B. DOVELL,
Assistant United States Attorney.

/s/ THOMAS R. WINTER,
Civil Advisory Counsel, Seattle District, Bureau of Internal Revenue.

Affidavit of Mailing attached.

[Endorsed]: Filed December 11, 1952.

[55] In United States District Court for the Western District of Washington Southern Division

No. 1101

HORTON CAPOEMAN AND EMMA CAPOEMAN, HIS WIFE, PLAINTIFFS, VS. UNITED STATES OF AMERICA AND CLARK SQUIRE, COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF WASHINGTON, DEFENDANTS

Opinion

August 27, 1952

JAMES ALGER FEE, *District Judge:*

Horton Capoeman and Emma Capoeman, his wife, both citizens of the United States, hereinafter referred to as "plaintiffs," are noncompetent Indian wards of the United States under the supervision and control of the Taholah Indian Agency. They are full-blood Quinaielt Indians, born and residing on the Quinaielt Reservation in the State of Washington.

Under the provisions of the Quinaielt Treaty with the United States, dated July 1, 1855, and January 25, 1856 (12 Stat. 971), Quinaielt Indian tribal lands were transferred to the United States, but there was reserved therefrom and set apart for the ~~exclusive~~ use of the members of the Quinaielt tribe an area designated in accordance with the terms of the treaty. On October 1, 1907, pursuant to the terms of the treaty and the General Allotment Act of February 8, 1887 (24 Stat. 388), a trust patent was issued to Horton Capoeman for approximately ninety-three acres of tribal land within the Quinaielt Reservation. The fee title to this land was and still is held by the United States in trust for Horton Capoeman, and said land was not and still is not subject to alienation nor encumbrance by plaintiffs except with the consent and approval of the proper agents of the United States.

56 During the year 1943, pursuant to a contract of sale entered into by the Bureau of Indian Affairs of the United States Department of Interior providing for the cutting and sale of timber from plaintiffs' allotment, $8,418.28 worth of timber was cut, sold and paid for. Of the $8,418.28 received, $1,537.00 was distributed to plaintiffs, and the balance of $6,878.00 (with $3.28 unaccounted for) was placed in trust by the United States and maintained, subject to withdrawal solely by or for their use and benefit, in an account for the plaintiffs.

Plaintiffs filed a joint income tax return for the calendar year 1943, reporting long-term capital gain from the sale of the timber

in that year. The return was filed on October 10, 1947, and on that date plaintiffs paid the taxes shown due.

On January 2, 1948, plaintiffs filed a claim for refund of the taxes paid, and contended that their income derived from the sale of timber from the allotted land was not subject to federal income taxation because such taxation would be in violation of the provisions of the Quinaielt Treaty and of the trust patent. The claim for refund was denied by the Bureau of Internal Revenue on January 21, 1948, and this action was instituted on March 3, 1948.

The refund must be allowed.

The United States now has a sum of money in trust for these Indian wards. It is demonstrable that this amount is part and parcel of the corpus of a trust estate which the government has held ever since the treaties of 1855 and 1856.[1] Before that
57 date, the Indians had rights of occupancy in a vast territory. These were ceded to the United States in return for protection and tutelage.[2] But there was expressly reserved the title to a tract of land.[3] The United States held the legal title thereof as trustee. When the allotment acts[4] were given effect, there was no change in this situation. The Indians simply relinquished their respective claims to a large area of communal lands, and each respectively accepted in lieu thereof equitable title to a definite parcel of land allotted in severalty.[5] At the end of the trust period, a conveyance was to be made to the Indian or his heirs of such parcel, in fee "discharged of said trust and free of all charge or incumbrance whatsoever."[6] This is a simple restatement of the obligation of the trustee. As a result, the United States has no power to levy a duty or impost or charge upon the lands over which it has plenary power by virtue of ownership and sovereignty. The State of Washington can levy no tax on the whole or any part or parcel thereof.[7] After the conveyance, which must be authorized by the Indian in order to burden him with the weight of obligation, the national and state governments are empowered to tax this land and its increments as the real property of any other citizen.[8] It follows that, until the land is

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[1] 12 Stat. 971.
[2] Article I of the Treaty, 12 Stat. 971.
[3] Article II of the Treaty, 12 Stat. 971.
[4] 24 Stat. 388, as amended 25 U. S. C. A. 331-57.
[5] 25 U. S. C. A. Sec. 331.
[6] 25 U. S. C. A. Sec. 348.
[7] The tax exemption "runs equally" against state and federal governments. See Landman vs. United States, 71 F. Supp. 640, 645; Oklahoma Tax Commission vs. United States, 319 U. S. 598.
[8] 25 U. S. C. A. Sec. 349.

thus conveyed, it cannot be treated as "capital" or a "capital asset." For by such classification the United States would
58 be violating not only a moral right of the Indian, but would be violating the statute by placing a "charge or incumbrance" on the land. The state cannot collect back taxes upon land before the date of conveyance in fee to the Indians. The federal government has no right upon a sale by the Indian immediately after a patent to him in fee, to tax the difference in value between the date of the treaty, or even March 1, 1913, and the date of sale as a capital asset. By that process it could destroy the value of the trust property. Likewise, there could be no tax upon a sale by the United States of ten acres out of an hundred-acre allotment with the consent of the allottee before the end of the trust period. The reason is that the government had the real property in trust before the sale of part thereof, and the price received is only a substitute charge. But here the sale was of part of the realty. Timber, until severed, is part of the land.[9] No distinction can be drawn between the operation and the sale of a parcel out of a larger area.[10]

During the long history of the Chancelors and in the equity courts, cutting of timber by one not the owner of the fee constituted waste, and the proceeds of timber cut by a trustee was a part of the trust estate. If the timber had remained standing upon the land until patent issued in fee, neither state nor national government could have taxed it because it was part of the trust property. Nor on sale of the severed timber after patent could the increment in value be based upon a date prior to the transfer of the land to the Indian.
59 This holding is not inconsistent with decisions that the proceeds of fructus industriales such as grasses cut from the land or the fruits of fisheries appurtenant can be taxed. There no portion of the corpus of the trust is taxed, but only the profit therefrom. It is more doubtful that the pro rata share of the individual Indian in the distribution of the yield of tribal communal lands can be taxed, but at least a basis for rationalization exists. In the instant situation, the trust is violated by an uncompensated diminution of the corpus.

For the reasons indicated, it is held that the refund is allowed.[11]

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[9] Northern Pacific Railroad vs. Paine, 119 U. S. 561, 564.

[10] This same reasoning was used in connection with oil and gas royalties by the Supreme Court in Parker vs. Riley, 250 U. S. 66, 70.

[11] Under the above analysis, the following cases are distinguishable and have no application to the instant situation: Jones vs. Pagnah, 10 Cir., 186 F. 2d 445; Choteau vs. Burnet, 283 U. S. 691; Superintendent of Five Civilized Tribes vs. Commissioner, 295 U. S. 418; Cherokee Tobacco, 11 Wall. 616; Strom vs. Commissioner of Internal Revenue, 6 T. C. 521.

[File endorsement omitted.]

60 [Clerk's Certificate to foregoing paper omitted in printing.]

62 Omit.

63 Omit.

64 In United States Court of Appeals for the Ninth Circuit

Minute entry of argument and submission

February 24, 1955

[Omitted in printing.]

65 In United States Court of Appeals for the Ninth Circuit

Order directing filing of opinion and filing and recording of judgment

March 11, 1955

Ordered that the typewritten per curiam opinion this day rendered by this Court in above cause be forthwith filed by the Clerk, and that a Judgment be filed and recorded in the minutes of the Court in accordance with the opinion rendered.

66 In United States Court of Appeals for the Ninth Circuit

No. 13,640

CLARK SQUIRE, COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF WASHINGTON, APPELLANT

vs.

HORTON CAPOEMAN AND EMMA CAPOEMAN, HIS WIFE, APPELLEES

Appeal from the United States District Court for the Western District of Washington, Southern Division.

Before: HEALY, BONE, and CHAMBERS, *Circuit Judges.*

Opinion per curiam

March 11, 1955

This case has to do with the taxability as income of the proceeds of a sale of timber on trust allotted land of a tribal Indian.

Under the provisions of a treaty with the Quinaielt Indian Tribe, 12 Stat. 971, tribal lands in what is now the State of Washington were transferred to the United States. By the terms of the treaty an area was reserved therefrom and set apart for the exclusive use of the members of the tribe. Pursuant to the terms of the treaty and of the General Allotment Act of 1887, 24 Stat. 388, a trust patent was issued to appellee Horton Capoeman for some ninety-three acres of tribal land within the Quinaielt Reservation. The fee title to this land was and still is in the United States in trust for Capoeman (an unemancipated member of the tribe) to be conveyed to him or his heirs at the end of the trust period in fee "discharged of said trust and free of all charge or incumbrance whatsoever." 25 USCA § 348.

67 In 1943, pursuant to a contract of sale entered into by the Bureau of Indian Affairs, with Capoeman's consent, standing timber on the latter's allotment was sold, cut and paid for. The timber, it is agreed, constituted the chief value of the land. A minor part of the sales price was distributed to Capoeman, the bulk of it being retained in trust for him by the United States. Capoeman and his wife, Emma, filed for that year a joint income tax return reporting long-term capital gain from the sale. Subsequently they brought this suit for refund of the tax paid, and the district court granted judgment in their favor.

The opinion of the trial judge is reported in 110 F. Supp. 924. Inasmuch as we agree with the judges' holding and in the main with the reasons given for it, no useful purpose would be served by our again plowing that field. Enough to say that in our view this attempt to tax evidences, at the least, a sorry breach of faith with these Indians. We may add that while the court below appeared to regard as distinguishable the decision of the Tenth Circuit in the cognate case of Jones v. Tannah, 186 F. 2d 445, we see no ground upon which the holding can be distinguished. Rather, we agree with the dissenting opinion of Chief Judge Phillips.

Affirmed.

[File endorsement omitted.]

68 In United States Court of Appeals for the Ninth Circuit

No. 13,640.

CLARK SQUIRE, COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF WASHINGTON, APPELLANT,

vs.

HORTON CAPOEMAN AND EMMA CAPOEMAN, HIS WIFE, APPELLEES.

Judgment

Filed and entered March 11, 1955.

Appeal from the United States District Court for the Western District of Washington, Southern Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Western District of Washington, Southern Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is affirmed.

[File endorsement omitted.]

69 [Clerk's Certificate to foregoing transcript omitted in printing.]

70 Supreme Court of the United States

No. 134, October Term, 1955

[Title omitted.]

Order allowing certiorari

Filed October 10, 1955.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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FILED
JUN 8 1955
HAROLD B. WILLEY, Clerk

No. 134

In the Supreme Court of the United States

OCTOBER TERM, 1955

CLARK SQUIRE, COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF WASHINGTON, PETITIONER

v.

HORTON CAPOEMAN AND EMMA CAPOEMAN, HIS WIFE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SIMON E. SOBELOFF,
Solicitor General,
Department of Justice, Washington 25, D. C.

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CITATIONS

Cases:

Choteau v. *Burnet*, 283 U. S. 691 — 7

Jones v. *Tauzin*, 186 F. 2d 445, certiorari denied, 341 U. S. 904 — 6

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Superintendent of Five Civilized Tribes v. *Commissioner*, 295 U. S. 418 — 7

Statutes and treaty:

Act of May 8, 1906, c. 2348, 34 Stat. 182 (25 U. S. C. 1952 ed., Sec. 349) — 6a

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Act of June 18, 1934, c. 576, 48 Stat. 984, Sec. 2 (25 U. S. C. 1952 ed., Sec. 462) — 7a

General Allotment Act of February 8, 1887, c. 119, 24 Stat. 388 — 3, 6, 8, 3a

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Internal Revenue Code of 1939:
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Treaty with the Quinaielt Indians, 12 Stat. 971 ..... 3, 8, 2a
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Art. II 2a
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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. —

CLARK SQUIRE, COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF WASHINGTON, PETITIONER

v.

HORTON CAPOEMAN AND EMMA CAPOEMAN, HIS WIFE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of Clark Squire, Collector of Internal Revenue for the District of Washington, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this case on March 11, 1955.

OPINION BELOW

The findings of fact and conclusions of law of the District Court (R. 38–44) are not reported. Its opinion dated August 27, 1952 (App. 8a–13a), is reported at 110 F. Supp. 924. The opinion of the Court of Appeals (App. 13a–15a) is reported at 220 F. 2d 349.

JURISDICTION

The judgment of the Court of Appeals was entered on March 11, 1955 (App. 15a). The jurisdiction of this Court is invoked under 28 U. S. C. 1254.

QUESTION PRESENTED

Whether income from the sale of timber from allotted, restricted land held in trust by the United States for restricted Quinaielt Indians is exempt from federal income tax.

STATUTES AND TREATY INVOLVED

The pertinent provisions of the statutes and treaty involved are set forth in Appendix A.

STATEMENT

Taxpayers are husband and wife, full-blood Quinaielt Indians, born on the Quinaielt Indian Reservation and duly enrolled and recognized members of the Quinaielt Indian Tribe. They are citizens of the United States and residents of the State of Washington, and are under the jurisdiction, supervision, and control of the United States acting through the Superintendent of the Taholah Indian Agency. They are classified as noncompetent Indians and wards of the United States Government. (R. 33.)

On July 1, 1855, and January 25, 1856, a treaty was concluded between the United States of America and the Quinaielt and allied bands of Indians, whereby the members of the Indian

tribes ceded to the United States their interest in certain lands within the territory of Washington then occupied by them (12 Stat. 971). Under the terms of that treaty, there was secured to members of the Quinaielt Indians a reservation of lands sufficient for their wants, which reservation was later designated by the United States and thereafter surveyed and set apart for their exclusive use. The Indian reservation so set aside has since been the home of the Quinaielt Indians, including taxpayers. (R. 34–35.)

Under authority of the Quinaielt treaty of July 1, 1855 (12 Stat. 971), the General Allotment Act of February 8, 1887 (c. 119, 24 Stat. 388), and supplementary or amendatory acts of Congress, the taxpayer husband was allotted 93.25 acres of real property within the Quinaielt Indian Reservation and a trust patent was issued to him on October 1, 1907. This land and the standing timber thereon, consisting of coniferous-bearing trees, is trust property under the joint supervision and control of the United States and of the taxpayer husband, and neither the land nor the timber growing thereon is subject to alienation by the allottee without consent and approval of the United States. The fee title to this land is held by the United States in trust for the allottee. (R. 35–36.)

During the year 1943 certain standing timber on taxpayers' allotted land was sold under a con-

tract entered into by the Bureau of Indian Affairs of the Department of the Interior with the approval of taxpayers, which contract of sale provided that payment for the timber should be made after it was cut and sold. A total of $15,080.80 was realized from this sale, $8,418.28 of which was received on behalf of taxpayers during 1943. The amount of $1,537 was paid over to taxpayers during 1943 and the balance of the 1943 receipts, or $6,878 (with an unaccounted expenditure of $3.28), was placed in trust by the United States and maintained in an account for the benefit of taxpayers, subject to withdrawal by or with the consent of the appropriate officials of the Department of the Interior. (R. 36.)

In 1947, taxpayers filed a joint income tax return for the year 1943, reporting taxable capital gain of $2,859.32 from the sale of the timber in that year, and on October 10, 1947, paid to the Collector the sum of $298.11 due thereon, plus $64.09 accrued interest (R. 15–18, 36–37). The timber had been acquired on October 1, 1907 (R. 13–15), and a total gain of $5,718.64 was reported, only 50% of which was treated as taxable as a long-term capital gain (R. 18). The gain of $5,718.64 reported was computed by deducting from the $8,418.28 received for the timber the amount of $2,026.80, as the March 1, 1913, fair market value, the timber having no actual cost basis and by deducting the amount of $673.46 as the expense of sale (costs of administration by

the Indian Agency) and the cost of improvements subsequent to March 1, 1913 (R. 18, 20).

The taxpayers filed a timely claim for refund of the taxes paid pursuant to this return (R. 20-27, 40). After denial of the claim, this refund suit was instituted on March 3, 1948 (R. 40).

On the basis of the foregoing facts, the District Court concluded, as far as here material, as follows:

That the United States holds the land allotted to the taxpayer husband in trust for him, that the moneys derived from the sale of timber are part and parcel of the trust estate, and that the United States has no power to levy a duty or impost or charge upon the lands over which it has plenary power by virtue of ownership and sovereignty; that the sale of timber which is involved in this case is the sale of part of the realty, because timber, until severed, is a part of the land, and that the United States cannot tax a part or the whole of the lands for the reason that it would be in violation of its trust and the guarantee stated in the General Allotment Act of February 8, 1887; and that this tax exemption once granted by Congress is a vested property right which cannot be impaired by subsequent legislation (R. 41-43, App. 10a-12a). The District Court accordingly held that the taxpayers were entitled to recover (R. 45, App. 13a). The Court of Appeals affirmed the judgment of the District Court (App. 13a-15a).

REASONS FOR GRANTING THE WRIT

1. The decision of the court below is in direct, express conflict with the decision of the Court of Appeals for the Tenth Circuit in *Jones* v. *Taunah*, 186 F. 2d 445, certiorari denied, 341 U. S. 904. In the *Taunah* case, as here, the issue was whether income derived by restricted Indians from allotted, restricted lands held in trust by the United States was exempt from federal income tax. Although the taxpayers in the present case are members of a different Indian tribe and although the income here consists of proceeds from the sale of timber which has been severed from the land, while in the *Taunah* case the income consisted, for the most part, of royalties and bonuses realized from the sale of oil and gas severed or to be severed from the land, the cases are alike in that the exemption from tax, if one exists, must be based upon the provisions of the General Allotment Act of 1887 (App. 3a–6a) and the unique relationship of the Indian taxpayers to the United States. The square conflict of decisions was conceded by the court below: "* * * while the [District Court] appeared to regard as distinguishable the decision of the Tenth Circuit in the cognate case of *Jones* v. *Taunah*, 186 F. 2d 445, we see no ground upon which the holding can be

distinguished. Rather, we agree with the dissenting opinion of Chief Judge Phillips" (App. 14a-15a).[1]

The decision below is also in conflict with the decision of the Tax Court in *Scott* v. *Commissioner*, 8 T. C. 126, which like the instant case involved the taxability of income paid on behalf of a Quinaielt Indian for timber cut from allotted, restricted land. Indeed, the instant taxpayers deferred the filing of the returns involved in this case pending the decision in the *Scott* case (R. 18-19).

2. We think the decision of the court below is erroneous and that the contrary decisions of the Tenth Circuit and of the Tax Court are correct. It is settled that Sections 11, 21, and 22 of the Internal Revenue Code of 1939 (App. 1a) subject to tax all the income of Indian citizens of the United States, like that of other citizens, unless an exemption from such taxation is definitely expressed in the taxing statute or in some act of Congress or agreement with the Indians dealing with their affairs. *Superintendent of Five Civilized Tribes* v. *Commissioner*, 295 U. S. 418; *Choteau* v. *Burnet*, 283 U. S. 691; *Oklahoma Tax Commission* v. *Texas Co.*, 336 U. S. 342, 353, fn. 21; *Oklahoma Tax Commission* v. *United States*, 319 U. S. 598. There is no express exemp-

[1] The District Court cited *Jones* v. *Taunah* in a footnote among cases which it said, without analysis, were distinguishable from the instant case (App. 13a).

tion from tax in the Quinaielt treaty of 1855 (App. 2a–3a) the General Allotment Act of 1887 (App. 3a–6a), or in the trust patent for the allotted lands (R. 13–15). By adopting the reasoning of the District Court, the court below erroneously held that to tax income derived from the sale of timber from taxpayers' land would place a charge on the land, contrary to the undertaking by the United States, contained in the General Allotment Act of 1887 and repeated in the trust patent (R. 13–15), to convey the allotted land at the end of the trust period to the allottee in fee "discharged of said trust and free of all charge or incumbrance whatsoever". But as held by the Tenth Circuit and the Tax Court, this general language is insufficient to create an implied exemption from tax of *income* from such land, including income from the sale of oil and gas, or timber, respectively.

3. The issue presented by this case is one of continuing importance in the administration of the revenue laws. It is also, of course, of importance to the approximately 225,000 Indians who, like these taxpayers, hold restricted, allotted lands. The lands concerned total about 13,600,000 acres, and the income derived from these lands is substantial. We are informed by the Department of the Interior that during the fiscal year ended June 30, 1954, more than $10,500,000 was realized in the form of rents, royalties and bonuses from oil and gas leases from restricted,

allotted lands, and that during calendar year 1954 more than $1,800,000 was realized from the sale of timber cut from such property. Unless the question of the taxability of this income is resolved by this Court, Indians within the jurisdiction of the Tenth Circuit will be taxed on their income from such property while Indians within the jurisdiction of the Ninth Circuit will be held exempt from such tax.

CONCLUSION

There is a conflict of decisions on a matter of continuing importance which should be resolved by this Court. The petition for a writ of certiorari should be granted.

Respectfully submitted,

SIMON E. SOBELOFF,
Solicitor General.

JUNE 1955.

APPENDIX A

Internal Revenue Code of 1939:

SEC. 11 [As amended by Sec. 102, Revenue Act of 1942, c. 619, 56 Stat. 798]. NORMAL TAX ON INDIVIDUALS.

There shall be levied, collected, and paid for each taxable year upon the net income of every individual a normal tax of 6 per centum of the amount of the net income in excess of the credits against net income provided in section 25. (For alternative tax, if gross income from certain sources is $3,000 or less, see section 400.)
(26 U.S.C. 1952 ed., Sec. 11.)

SEC. 21. NET INCOME.

(a) *Definition.*—"Net income" means the gross income computed under section 22, less the deductions allowed by section 23.

* * * * *

(26 U.S.C. 1952 ed., Sec. 21.)

SEC. 22. GROSS INCOME.

(a) *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service * * *, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or

gains or profits and income derived from any source whatever. * * *

* * * * *

(26 U. S. C. 1952 ed., Sec. 22.)

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * * *

(m) *Depletion.*—In the case of * * * timber, a reasonable allowance for depletion and for depreciation of improvements, according to the peculiar conditions in each case; * * *

* * * * *

(26 U. S. C. 1952 ed., Sec. 23.)

Treaty with the Qui-nai-elts, 12 Stat. 971:

Treaty between the United States and the Qui-nai-elt and Quil-leh-ute Indians. Concluded on the Qui-nai-elt River, in the Territory of Washington, July 1, 1855, and at the city of Olympia, January 25, 1856. Ratified by the Senate, March 8, 1859. Proclaimed by the President of the United States, April 11, 1859

* * * * *

Whereas, a treaty was made and concluded on the Qui-nai-elt River, in the Territory of Washington, on the first day of July, one thousand eight hundred and fifty-five, and at the city of Olympia also in said Territory, on the twenty-fifth day of January, one thousand eight hundred and fifty-six, between Isaac I. Stevens, governor and superintendent of Indian affairs in the Territory aforesaid, on the part of the United States, and the hereinafter-named chiefs, headmen, and delegates of the different tribes and bands of the Qui-nai-elt and

Quil-leh-ute Indians, on the part of said tribes and bands, and duly authorized thereto by them; which treaty is in the words and figures following, to wit:—

* * * * *

ARTICLE I. The said tribes and bands hereby cede, relinquish, and convey to the United States all their right, title, and interest in and to the lands and country occupied by them, bounded and described as follows: * * *

ARTICLE II. There shall, however, be reserved, for the use and occupation of the tribes and bands aforesaid, a tract or tracts of land sufficient for their wants within the Territory of Washington, to be selected by the President of the United States, and hereafter surveyed or located and set apart for their exclusive use; and no white man shall be permitted to reside thereon without permission of the tribe and of the superintendent of Indian affairs or Indian agent. And the said tribes and bands agree to remove to and settle upon the same within one year after the ratification of this treaty, or sooner if the means are furnished them. In the meantime it shall be lawful for them to reside upon any lands not in the actual claim and occupation of citizens of the United States, and upon any lands claimed or occupied, if with the permission of the owner or claimant. * * *

* * * * *

ARTICLE V. To enable the said Indians to remove to and settle upon such reservation as may be selected for them by the President, and to clear, fence, and break up a sufficient quantity of land for cultivation, the United States further agree to pay the

sum of two thousand five hundred dollars * * *

* * * * *

General Allotment Act of February 8, 1887, 24 Stat. 388:

> CHAP. 119. An act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes.
>
> SEC. 1. [As amended by Sec. 17, Act of June 25, 1910, c. 431, 36 Stat. 855] That in all cases where any tribe or band of Indians has been or shall hereafter be located upon any reservation created for their use by treaty stipulation, Act of Congress, or executive order, the President shall be authorized to cause the same or any part thereof to be surveyed or resurveyed whenever in his opinion such reservation or any part thereof may be advantageously utilized for agricultural or grazing purposes by such Indians, and to cause allotment to each Indian located thereon to be made in such areas as in his opinion may be for their best interest not to exceed eighty acres of agricultural or one hundred and sixty acres of grazing land to any one Indian. * * * (25 U. S. C. 1952 ed., Sec. 331.)

* * * * *

> SEC. 5. That upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust

for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: *Provided*, That the President of the United States may in any case in his discretion extend the period. And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void: * * *

(25 U. S. C. 1952 ed., Sec. 348.)

SEC. 6. That upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and ~~criminal,~~ of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law. And every Indian born within the territorial limits of the United States to whom allotments shall have been made under the provisions of this act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted

the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property.
(25 U. S. C. 1952 ed., Sec. 349.)

Act of May 8, 1906, c. 2348, 34 Stat. 182:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section six of an Act approved February eighth, eighteen hundred and eighty-seven, entitled "An Act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes," be amended to read as follows:

"SEC. 6. * * * That the Secretary of the Interior may, in his discretion, and he is hereby authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed and said land shall not be liable to the satisfaction of any debt contracted prior to the issuing of such patent: * * *"

* * * *

(25 U. S. C. 1952 ed., Sec. 349.)

Act of June 25, 1910, c. 431, 36 Stat. 855:

* * * * *

SEC. 8. That the timber on any Indian allotment held under a trust or other patent containing restrictions on alienations, may be sold by the allottee with the consent of the Secretary of the Interior and the proceeds thereof shall be paid to the allottee or disposed of for his benefit under regulations to be prescribed by the Secretary of the Interior.

* * * * *

(25 U. S. C. 1952 ed., Sec. 406.)

Act of June 18, 1934, c. 576, 48 Stat. 984:

An Act To conserve and develop Indian lands and resources; to extend to Indians the right to form business and other organizations; to establish a credit system for Indians; to grant certain rights of home rule to Indians; to provide for vocational education for Indians; and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That * * *

SEC. 2. The existing periods of trust placed upon any Indian lands and any restriction on alienation thereof are hereby extended and continued until otherwise directed by Congress.

* * * * *

(25 U. S. C. 1952 ed., Sec. 462.)

APPENDIX B

In the District Court of the United States for the Western District of Washington, Southern Division

No. 1101

HORTON CAPOEMAN AND EMMA CAPOEMAN, HIS WIFE, PLAINTIFFS

v.

UNITED STATES OF AMERICA AND CLARK SQUIRE, COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF WASHINGTON, DEFENDANTS

Filed September 3, 1952.

Opinion

August 27, 1952

JAMES ALGER FEE, *District Judge:*

Horton Capoeman and Emma Capoeman, his wife, both citizens of the United States, hereinafter referred to as "plaintiffs," are noncompetent Indian wards of the United States under the supervision and control of the Taholah Indian Agency. They are full-blood Quinaielt Indians, born and residing on the Quinaielt Reservation in the State of Washington.

Under the provisions of the Quinaielt Treaty with the United States, dated July 1, 1855, and January 25, 1856 (12 Stat. 971), Quinaielt Indian tribal lands were transferred to the United States, but there was reserved therefrom and set apart

for the exclusive use of the members of the Quinaielt tribe an area designated in accordance with the terms of the treaty. On October 1, 1907, pursuant to the terms of the treaty and the General Allotment Act of February 8, 1887 (24 Stat. 388), a trust patent was issued to Horton Capoeman for approximately ninety-three acres of tribal land within the Quinaielt Reservation. The fee title to this land was and still is held by the United States in trust for Horton Capoeman, and said land was not and still is not subject to alienation nor encumbrance by plaintiffs except with the consent and approval of the proper agents of the United States.

During the year 1943, pursuant to a contract of sale entered into by the Bureau of Indian Affairs of the United States Department of Interior providing for the cutting and sale of timber from plaintiffs' allotment, $8,418.28 worth of timber was cut, sold and paid for. Of the $8,418.28 received, $1,537.00 was distributed to plaintiffs, and the balance of $6,878.00 (with $3.28 unaccounted for) was placed in trust by the United States and maintained, subject to withdrawal solely by or for their use and benefit, in an account for the plaintiffs.

Plaintiffs filed a joint income tax return for the calendar year 1943, reporting long-term capital gain from the sale of the timber in that year. The return was filed on October 10, 1947, and on that date plaintiffs paid the taxes shown due.

On January 2, 1948, plaintiffs filed a claim for refund of the taxes paid, and contended that their income derived from the sale of timber from the allotted land was not subject to federal income

taxation because such taxation would be in violation of the provisions of the Quinaielt Treaty and of the trust patent. The claim for refund was denied by the Bureau of Internal Revenue on January 21, 1948, and this action was instituted on March 3, 1948.

The refund must be allowed.

The United States now has a sum of money in trust for these Indian wards. It is demonstrable that this amount is part and parcel of the corpus of a trust estate which the government has held ever since the treaties of 1855 and 1856.[1] Before that date, the Indians had rights of occupancy in a vast territory. These were ceded to the United States in return for protection and tutelage.[2] But there was expressly reserved the title to a tract of land.[3] The United States held the legal title thereof as trustee. When the allotment acts[4] were given effect, there was no change in this situation. The Indians simply relinquished their respective claims to a large area of communal lands, and each respectively accepted in lieu thereof equitable title to a definite parcel of land allotted in severalty.[5] At the end of the trust period, a conveyance was to be made to the Indian or his heirs of such parcel in fee "discharged of said trust and free of all charge or incumbrance whatsoever."[6] This is a simple restatement of the obligation of the trustee. As a result, the

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[1] 12 Stat. 971.

[2] Article I of the Treaty, 12 Stat. 971.

[3] Article II of the Treaty, 12 Stat. 971.

[4] 24 Stat. 388, as amended, 25 U. S. C. A. 331–57.

[5] 25 U. S. C. A. § 331.

[6] 25 U. S. C. A. § 348.

United States has no power to levy a duty or impost or charge upon the lands over which it has plenary power by virtue of ownership and sovereignty. The State of Washington can levy no tax on the whole or any part or parcel thereof.[7] After the conveyance, which must be authorized by the Indian in order to burden him with the weight of obligation, the national and state governments are empowered to tax this land and its increments as the real property of any other citizen.[8] It follows that, until the land is thus conveyed, it cannot be treated as "capital" or a "capital asset." For, by such classification, the United States would be violating not only a moral right of the Indian, but would be violating the statute by placing a "charge or incumbrance" on the land. The state cannot collect back taxes upon land before the date of conveyance in fee to the Indians. The federal government has no right upon a sale by the Indian, immediately after a patent to him in fee, to tax the difference in value between the date of the treaty, or even March 1, 1913, and the date of sale as a capital asset. By that process it could destroy the value of the trust property. Likewise, there could be no tax upon a sale by the United States of ten acres out of an hundred acre allotment with the consent of the allottee before the end of the trust period. The reason is that the government had the real property in trust before the sale of part

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[7] The tax exemption runs equally against state and federal governments. See *Landman* v. *United States*, 71 F. Supp. 640, 647; *Oklahoma Tax Commission* v. *United States*, 319 U. S. 598.

[8] 25 U. S. C. A. § 349.

thereof, and the price received is only a substitute charge. But here the sale was of part of the realty. Timber, until severed, is part of the land.[9] No distinction can be drawn between the operation and the sale of a parcel out of a larger area.[10]

During the long history of the Chancelors and in the equity courts, cutting of timber by one not the owner of the fee constituted waste, and the proceeds of timber cut by a trustee was a part of the trust estate. If the timber had remained standing upon the land until patent issued in fee, neither state nor national government could have taxed it because it was part of the trust property. Nor on sale of the severed timber after patent could the increment in value be based upon a date prior to the transfer of the land to the Indian.

This holding is not inconsistent with decisions that the proceeds of fructus industriales such as grasses cut from the land or the fruits of fisheries appurtenant can be taxed. There no portion of the corpus of the trust is taxed, but only the profit therefrom. It is more doubtful that the pro rata share of the individual Indian in the distribution of the yield of tribal communal lands can be taxed, but at least a basis for rationalization exists. In the instant situation, the trust is violated by an uncompensated diminution of the corpus.

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[9] *Northern Pacific Railroad* v. *Paine*, 119 U. S. 561, 564.

[10] This same reasoning was used in connection with oil and gas royalties by the Supreme Court in *Parker* v. *Riley*, 250 U. S. 66, 70.

For the reasons indicated, it is held that the refund is allowed.[11]

United States Court of Appeals for the Ninth Circuit

No. 13640

March 11, 1955

CLARK SQUIRE, COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF WASHINGTON, APPELLANT

v.

HORTON CAPOEMAN AND EMMA CAPOEMAN, HIS WIFE, APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

Before HEALY, BONE, and CHAMBERS, *Circuit Judges*.

PER CURIAM

This case has to do with the taxability as income of the proceeds of a sale of timber on trust allotted land of a tribal Indian.

Under the provisions of a treaty with the Quinaielt Indian Tribe, 12 Stat. 971, tribal lands in what is now the State of Washington were transferred to the United States. By the terms of the treaty an area was reserved therefrom and

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[11] Under the above analysis the following cases are distinguishable and have no application to the instant situation: *Jones* v. *Taunah*, 10 Cir., 186 F. 2d 445; *Choteau* v. *Burnet*, 283 U. S. 691; *Superintendent of Five Civilized Tribes* v. *Commissioner*, 295 U. S. 418; *Cherokee Tobacco*, 11 Wall. 616; *Strom* v. *Commissioner of Internal Revenue*, 6 T. C. 621.

set apart for the exclusive use of the members of the tribe. Pursuant to the terms of the treaty and of the General Allotment Act of 1887, 24 Stat. 388, a trust patent was issued to appellee Horton Capoeman for some ninety-three acres of tribal land within the Quinaielt Reservation. The fee title to this land was and still is in the United States in trust for Capoeman (an unemancipated member of the tribe) to be conveyed to him or his heirs at the end of the trust period in fee "discharged of said trust and free of all charge or incumbrance whatsoever." 25 U. S. C. A. § 348.

In 1943, pursuant to a contract of sale entered into by the Bureau of Indian Affairs, with Capoeman's consent, standing timber on the latter's allotment was sold, cut and paid for. The timber, it is agreed, constituted the chief value of the land. A minor part of the sales price was distributed to Capoeman, the bulk of it being retained in trust for him by the United States. Capoeman and his wife, Emma, filed for that year a joint income tax return reporting long-term capital gain from the sale. Subsequently they brought this suit for refund of the tax paid, and the district court granted judgment in their favor.

The opinion of the trial judge is reported in 110 F. Supp. 924. Inasmuch as we agree with the judge's holding and in the main with the reasons given for it, no useful purpose would be served by our again plowing that field. Enough to say that in our view this attempt to tax evidences, at the least, a sorry breach of faith with these Indians. We may add that while the court below appeared to regard as distinguishable the

decision of the Tenth Circuit in the cognate case of *Jones v. Tawnah*, 186 F. 2d 445, we see no ground upon which the holding can be distinguished. Rather, we agree with the dissenting opinion of Chief Judge Phillips.

Affirmed.

(Endorsed:) Per Curiam Opinion.

Filed Mar. 11, 1955.

PAUL P. O'BRIEN,
Clerk.

[Caption omitted.]

Judgment

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Western District of Washington, Southern Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is affirmed.

(Endorsed) Judgment.

Filed and entered March 11, 1955.

PAUL P. O'BRIEN,
Clerk.

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No 134

In the Supreme Court of the United States

OCTOBER TERM, 1955

CLARK SQUIRE, COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF WASHINGTON, PETITIONER

v.

HORTON CAPOEMAN AND EMMA CAPOEMAN, HIS WIFE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 134

CLARK SQUIRE, COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF WASHINGTON, PETITIONER

v.

HORTON CAPOEMAN AND EMMA CAPOEMAN, HIS WIFE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The District Court's opinion of August 27, 1952 (R. 55–57) is reported at 110 F. Supp. 924. The opinion of the Court of Appeals (R. 58–59) is reportd at 220 F. 2d 349.

JURISDICTION

The judgment of the Court of Appeals was entered on March 11, 1955 (R. 60). The petition for a writ of certiorari was filed on June 8, 1955, and was granted on October 10, 1955 (R. 60). The jurisdiction of this Court rests on 28 U. S. C. 1254.

QUESTION PRESENTED

Whether income from the sale of timber from allotted, restricted land held in trust by the United States for noncompetent Quinaielt Indians is exempt from federal income tax.

STATUTES AND OTHER AUTHORITIES INVOLVED

The relevant portions of Sections 11, 21 (a), 22 (a), 23 (m), 113 (a) (14), 113 (b), 114 (b) (1) and 117 (k) (2) of the Internal Revenue Code of 1939;[1] the Treaty with the Qui-nai-elts; the General Allotment Act of February 8, 1887; the Acts of May 8, 1906, June 25, 1910, June 2, 1924, March 4, 1933, June 6, 1934, and June 18, 1934; Section 29.23(m)–20 of Treasury Regulations 111; the General Forest Regulations; and General Timber Sale Regulations, Form 5-502 of the Department of Interior, are set forth in the Appendix, *infra*, pp 36–51.

STATEMENT

Taxpayers are husband and wife, full-blood Quinaielt Indians, born on the Quinaielt Indian

[1] Unless otherwise indicated, references to the Code will be to the Internal Revenue Code of 1939.

Reservation and duly enrolled and recognized members of the Quinaielt Indian Tribe. They are citizens of the United States and residents of the State of Washington, and are under the jurisdiction, supervision, and control of the United States acting through the Superintendent of the Taholah Indian Agency. They are classified by the Department of the Interior as noncompetent Indians and wards of the United States Government. (R. 33.)

On July 1, 1855, and January 25, 1856, a treaty was concluded between the United States of America and the Quinaielt and allied bands of Indians, whereby the members of the Indian tribes ceded to the United States their interest in certain lands within the territory of Washington then occupied by them (12 Stat. 971; App. pp. 39–40). Under the terms of that treaty, there was secured to members of the Quinaielt Indians a reservation of lands sufficient for their wants, which reservation was later designated by the United States[2] and thereafter surveyed and set apart for their exclusive use. The Indian reservation so set aside has since been the home of the Quinaielt Indians, including taxpayers (R. 34–35).

Under authority of the Quinaielt Treaty, the General Allotment Act of February 8, 1887 (c.

[2] See Executive Order of November 4, 1873, *Executive Orders Relating to Indian Reserves from May 14, 1855, to July 1, 1902, p. 143* (Government Printing Office, 1902).

119, 24 Stat. 388; App. pp. 40–42), and supplementary or amendatory acts of Congress, the taxpayer husband was allotted 93.25 acres of real property within the Quinaielt Indian Reservation and a trust patent was issued to him on October 1, 1907. This land and the standing timber thereon, consisting of coniferous-bearing trees, are trust property under the joint supervision and control of the United States and of the taxpayer husband, and neither the land nor the timber growing thereon is subject to alienation by the allottee without consent and approval of the United States. The fee title to this land is held by the United States in trust for the allottee. (R. 35–36.)

During the year 1943 certain standing timber on taxpayers' allotted land was sold under a contract entered into by the Bureau of Indian Affairs of the Department of the Interior with the approval of taxpayers. The contract of sale provided that payment for the timber should be made after it was cut and sold. A total of $15,080.80 was realized from this sale, $8,418.28 of which was received on behalf of taxpayers during 1943. The amount of $1,537 was paid over to taxpayers during 1943 and the balance of the 1943 receipts, or $6,878 (with an unaccounted expenditure of $3.28), was placed in trust by the United States

and maintained in an account for the benefit of taxpayers, subject to withdrawal by or with the consent of the appropriate officials of the Department of the Interior. (R. 36.)

In 1947, the Tahoiah Indian Agency, on behalf of taxpayers and with their consent, filed a joint income tax return for the year 1943, reporting taxable capital gain of $2,859.32 from the sale of the timber in that year, and on October 10, 1947, paid to the Collector the sum of $298.11 due thereon, plus $64.09 accrued interest (R. 15–18, 36–37). The timber had been acquired on October 1, 1907, when the trust patent was issued (R. 13–15), and a total gain of $5,718.64 was reported, 50% of which was treated as taxable as a long-term capital gain (R. 18). The gain of $5,718.64 reported was computed by deducting from the $8,418.28 received for the timber the amount of $2,026.80, as the March 1, 1913, fair market value, the timber having no actual cost basis and by deducting the amount of $673.46 as the expense of sale (costs of administration by the Indian Agency) and the cost of improvements subsequent to March 1, 1913 (R. 18, 20).

The taxpayers filed a timely claim for refund of the taxes paid pursuant to this return (R. 20–27, 40). After denial of the claim, this refund suit was instituted on March 3, 1948 (R. 40).

On the basis of the foregoing facts, the District Court concluded, so far as here material, as follows:

> That the United States holds the land allotted to the taxpayer husband in trust for him, that the moneys derived from the sale of timber are part and parcel of the trust estate, and that the United States has no power to levy a duty or impost or charge upon the trust estate over which it has plenary power by virtue of ownership and sovereignty; that the sale of timber which is involved in this case is the sale of part of the realty, because timber, until severed, is a part of the land, and that the United States cannot tax a part or the whole of the lands for the reason that it would be in violation of its trust and the guarantee stated in the General Allotment Act of February 8, 1887, to deliver the lands at the end of the trust period "discharged of said trust and free of all charge or incumbrance whatsoever"; and that this tax exemption once granted by Congress is a vested property right which cannot be impaired by subsequent legislation (R. 41–43). The District Court accordingly held that the taxpayers were entitled to recover (R. 45, 55–57). The Court of Appeals for the Ninth Circuit affirmed, stating in a *per curiam* opinion that it agreed "in the main" with the reasons given by the District Court (R. 58–59).

SUMMARY OF ARGUMENT

Taxpayers are full-blood, noncompetent Quinaielt Indians who derived income from the severance and sale of timber from allotted lands which are held in trust for them by the United States. As citizens of the United States they are taxable under the broad provisions of Sections 11 and 22 (a) of the Internal Revenue Code of 1939, which imposes a tax on the net income of every individual, derived from any source whatever. There is no exemption from tax in the Quinaielt treaty, the General Allotment Act, the taxing statute, or in any other legislation dealing with taxpayers' affairs.

Taxpayers base their argument for tax exemption wholly on the undertaking by the United States, contained in the General Allotment Act, to deliver allotted lands, at the conclusion of the trust period, "free of all charge or incumbrance whatsoever." This provision is insufficient to support an exemption for taxpayers from the comprehensive coverage of the federal income-tax laws.

The decisions of the courts below are bottomed on the proposition that the imposition of a tax on income from the sale of timber would somehow diminish the value of the trust property which the United States is obliged to turn over to the Indians at the conclusion of the trust period. But this proposition is patently fallacious. No portion of the income tax here imposed can be re-

garded as being paid out of the corpus of the trust property. The tax is placed on the net income or gain derived from cutting timber from the property. The tax computation insures that the taxpayer will not be taxed on such portion of the corpus of the trust property as may be consumed in the income-producing operation, for the statute permits an allowance for depletion or, at the election of the taxpayer, a deduction of his cost basis or the March 1, 1913, value of the timber which is cut and sold. Consequently, neither the trust property nor its converted proceeds is being taxed. Furthermore, the timber-cutting program authorized by the Secretary of the Interior is one designed to protect and increase, for the benefit of the noncompetent Indians, the value of the trust property.

Even if it be assumed that the United States would be prohibited from imposing a direct tax on the allotted land held in trust for the taxpayers, there would, nevertheless, be no prohibition against a federal tax on the income derived from the land, since a tax on such income is not the same as a tax on the source of the income, the land.

Taxpayers' argument that an exemption from tax must be found, since otherwise income taxes unpaid at the time the fee patent is issued would constitute a charge upon the land, is largely hypothetical. During the trust period all income derived from the allotted trust lands is received

by the Taholah Indian Agency and held by it subject to disbursement for taxpayers' account. It will be time enough to consider the question of the validity of a lien for such taxes should the United States ever attempt to assert such a lien against allotted land. But in any event, the fact that the United States may be precluded from enforcing such a lien would not defeat the tax itself.

We conclude that the imposition of the federal income tax on income or gain derived from allotted trust lands is not inconsistent with the obligation of the United States to deliver the lands at the conclusion of the trust period free of any charge or encumbrance whatsoever.

ARGUMENT

INCOME DERIVED BY NONCOMPETENT INDIANS FROM THE SALE OF TIMBER FROM THEIR ALLOTTED LANDS HELD IN TRUST BY THE UNITED STATES IS SUBJECT TO THE FEDERAL INCOME TAX

Horton and Emma Capoeman, the taxpayers, are full-blood, noncompetent Quinaielt Indians. Their property and the income therefrom is restricted, i. e., is not freely alienable by them, and is under the direct supervision of the Superintendent of the Taholah Indian Agency. The question presented by this case is whether certain of their restricted income, derived from the severance and sale of timber on allotted lands which are held in trust for them by the United

States, is exempt from the federal income tax. We believe, for the reasons stated hereafter, that the court below was wrong in holding this income to be exempt from the federal income tax and that the Court of Appeals for the Tenth Circuit reached the correct result in *Jones* v. *Tannah,* 186 F. 2d 445, certiorari denied, 341 U. S. 904, where it held that the income of non-competent Indians, derived for the most part from royalties and bonuses from the sale of oil and gas severed or to be severed from allotted trust lands, was subject to the federal income tax.[3]

A. THE INTERNAL REVENUE CODE, WITH EXCEPTIONS NOT HERE PERTINENT, TAXES THE NET INCOME OF EVERY INDIVIDUAL FROM ANY SOURCE WHATEVER

The Sixteenth Amendment to the Constitution empowers Congress to levy, without apportionment, taxes on income "from whatever source derived". Section 11 of the Internal Revenue Code (App. p. 36) levies a tax on "the net income of every individual". Section 22 (a) of the Code (App. p. 36) defines income to include that derived "from any source whatever". By such comprehensive language Congress exercised its taxing power to the fullest extent and, sub-

[3] In *Scott* v. *Commissioner*, 8 T. C. 126, involving the precise situation presented by the case at bar, the Tax Court upheld the imposition of income tax on the gain derived from the sale of timber from the allotted trust land of a restricted Quinaielt Indian.

ject to certain specific exemptions and exceptions, not here pertinent, extended the income tax to every kind of person and to every type of income. *Choteau* v. *Burnet*, 283 U. S. 691, 693, 696; *Superintendent* v. *Commissioner*, 295 U. S. 418, 419–420; *Heiner* v. *Colonial Trust Co.*, 275 U. S. 232, 234–235; *Commissioner* v. *Glenshaw Glass Co.*, 348 U. S. 426, 430.

It has been established that the broad sweep of the income tax reaches the income of Indians without regard to the precise nature of their status or of their relationship to the Federal Government, and without regard to the existence of restrictions on the alienability of their income. *Choteau* v. *Burnet*, *supra*; *Superintendent* v. *Commissioner*, *supra*. There is, accordingly, nothing in the income tax statute to support the conclusion that the income in question was intended to be exempted or excluded from tax simply because the taxpayers are noncompetent Indians or because they may not freely spend their incomes or because they stand in a special relationship to the Federal Government. Indeed the taxpayers themselves recognize (Br. in Op. 9) that "Indians are not exempt from tax on their income." And the Court of Appeals for the Ninth Circuit recognized these principles when, in *Strom* v. *Commissioner*, 158 F. 2d 520, affirming *per curiam*, 6 T. C. 621, it upheld the taxation of income of restricted Quinaielt Indians

derived from the sale of fish taken from common, unallotted tribal property pursuant to a tribal right guaranteed by treaty. It was there held that a tax on the income was not a burden or restriction on the right to fish guaranteed by the treaty, and that the Quinaielts, like other citizens, are taxable on their income even though derived from the exercise of a tribal right. See also *Garry* v. *Commissioner*, 24 T. C. No. 23, where income derived by a Coeur d'Alene Indian from the sale of grain produced on allotted, restricted lands which he had inherited was held taxable.

If, then, an exemption from taxation does exist, it must be found elsewhere.

B. CONGRESS HAS NOT OTHERWISE, BY STATUTE OR TREATY WITH THE QUINAIELT INDIANS, EXPRESSLY EXEMPTED SUCH INCOME FROM THE FEDERAL INCOME TAX

Taxpayers do not contend that any express exemption from federal income tax can be found in the Quinaielt treaty of July 1, 1855 (App. pp. 39–40), the General Allotment Act of February 8, 1887, as amended (App. pp. 40–42), or in the trust patent issued to the taxpayer husband (R. 13–15). Indeed, a mere reading of these references demonstrates that they contain no provisions expressly exempting respondents from tax.

Taxpayers (Br. in Op. 2), as did the courts below (R. 55–59), base their argument for tax exemption wholly on the undertaking by the United States, contained in the General Allotment Act, to deliver allotted lands, at the conclusion of the

trust period, "free of all charge or incumbrance whatsoever." Neither the courts below nor the taxpayer have pointed to any other provision of law or agreement from which an exemption from taxation might possibly be inferred.[4]

It is clear, therefore, that the exemption from tax claimed by taxpayers rests wholly on implication. We examine, *infra*, the reasons advanced by the courts below in support of their conclusion that such an implication was warranted, and show them to be fallacious. But it

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[4] Although not relied on by the courts below, it may be pointed out that Section 6 of the General Allotment Act, as amended by the Act of May 8, 1906 (App. pp. 42–43), empowered the Secretary of the Interior, in certain circumstances, to issue a fee patent to competent allottees and provided that "thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed." Since it had never been the policy of the United States to levy direct taxes on lands because of the constitutional requirement of apportionment, this provision was undoubtedly intended to make it clear that Indian lands transferred in fee to the Indians would thereafter be subject to state and local taxation. *McCurdy* v. *United States*, 264 U. S. 484; *United States* v. *Rickert*, 188 U. S. 432. See *Superintendent* v. *Commissioner*, 295 U. S. 418, 421; *Landman* v. *Commissioner*, 123 F. 2d 787, 790, certiorari denied, 315 U. S. 810; see also S. Rep. No. 1998, 59th Cong., 1st Sess.; H. Rep. No. 1558, 59th Cong., 1st Sess. There were, of course, no federal or state income taxes at this time.

It may be noted that, as of the date of the Quinaielt treaty, all property of Indians was expressly exempted from local property taxes by the revenue laws of the Territory of Washington. See Laws of the Territory of Washington, Being the Code Passed by the Legislative Assembly at Their First Session Begun and Held at Olympia, February 27, 1854, pp. 331–332.

is appropriate at the outset to note that it is now clear that a claimed exemption from the comprehensive coverage of the federal income-tax laws must rest on something more substantial than an implication derived from general provisions of the statute or treaty which were aimed at totally different objectives. *Superintendent* v. *Commissioner*, 295 U. S. 418, 420; *Choteau* v. *Burnet*, 283 U. S. 691, 693, 696; *Oklahoma Tax Comm'n* v. *Texas Co.*, 336 U. S. 342, 353, fn. 21, rehearing denied, 336 U. S. 958; *Jones* v. *Tawnah*, 186 F. 2d 445 (C. A. 10th), certiorari denied, 341 U. S. 904. See, also, *Oklahoma Tax Comm'n* v. *United States*, 319 U. S. 598, 606–608. Nor would it be helpful to say that the treaty should be construed so that all doubts are resolved in favor of the Indians. As this Court pointed out in *Shoshone Indians* v. *United States*, 324 U. S. 335, 353, rehearing denied, 324 U. S. 890, 325 U. S. 840, this rule of construction means no more than that the language shall be constructed in accordance with the tenor of the treaty; however, the terms of the treaty may not be varied to meet alleged injustices, for such generosity, if any may be called for in the relations between the United States and the Indians, is for Congress. See, also, *United States* v. *Choctaw &c. Nations*, 179 U. S. 494, 534–536; *Choctaw Nation* v. *United States*, 318 U. S. 423, 432. Immunity from taxation can no more be made to rest on treaty implications than it can

be made to rest on statutory or constitutional implications.

As is true in other areas involving the application of principles of tax immunity, the taxable status of Indians has been subject to conceptual growth. In *United States* v. *Rickert*, 188 U. S. 432, the Court held that a state could not impose an *ad valorem* property tax on alloted trust lands or improvements thereon on the ground that the tax was on an "instrumentality employed by the United States" (*id.* at 437), and reasoned further that if the tax were imposed and not paid the property could be sold for delinquent taxes, thus preventing the United States from discharging its obligations to keep the land free from encumbrances without itself paying the taxes imposed from year to year (*id.* at 438). But in *Choteau* v. *Burnet*, 283 U. S. 691, this Court made it clear that these reasons were inapplicable to the liability of Indians for *federal* taxes. There the Court refused to imply an exemption from tax for income received by an Indian on his share of the royalties from oil and gas rights on allotted lands, which income was paid over to the Indian without restrictions as to its use.[8] And in *Superintendent* v. *Commissioner*, 295 U. S. 418, this Court refused to imply an exemption from tax on

[8] See *Oklahoma Tax Commission* v. *United States*, 319 U. S. 598, 606–608. Cf. *O'Malley* v. *Woodrough*, 307 U. S. 277, 280–283 (liability of federal judges for income taxes on their salaries, see *infra*, pp. 29–30).

behalf of trusteed income of a restricted Indian. There the Indian had derived income in excess of his needs from restricted allotted lands held in trust for him, which income was re-invested. The Court held this income on invested funds, which funds had originally been derived from his restricted allotted land, to be subject to tax. The Court could find nothing in the statutes or treaty concerned "which expresses definite intent to exclude from taxation such income as that here involved" (*id.* at 421).[6]

More recently this Court cited with approval a Tenth Circuit case holding that an Indian's estate is subject to the federal estate tax (*Landman* v. *Commissioner,* 123 F. 2d 787, certiorari denied, 315 U. S. 810), and referred in its opinion to the intention of Congress "to impose federal income and inheritance taxes on the Indians."

[6] This Court's decision in *Superintendent* v. *Commissioner*, 295 U. S. 418, resulted in an opinion of the Attorney General (39 Op. A. G. 107 (1937)), overruling earlier, contrary rulings: 34 Op. A. G. 275 (1924); 34 Op. A. G. 302 (1924); 34 Op. A. G. 439 (1925); 35 Op. A. G. 1 (1925); 35 Op. A. G. 107 (1926). Two of these opinions were published by the Treasury Department in 1924 and 1925 as T. D. 3570, III–1 Cum. Bull. 85 (1924), and T. D. 3754, IV–2 Cum. Bull. 37 (1925). The Treasury Department published 39 Op. A. G. 107 (1937) as Revenue Ruling XVI–51–9098, 1937–2 Cum. Bull. 61. Subsequent rulings of the Commissioner continue to recognize that the income of noncompetent Indians from allotted lands is, in the absence of a specific exemption from tax, subject to the federal income tax. See G. C. M. 26399, 1950–2 Cum. Bull. 8; and Revenue Ruling 1954–2 Cum. Bull. 49.

Oklahoma Tax Commission v. *United States*, 319 U. S. 598, 608. We think that these decisions, as held by the Court of Appeals for the Tenth Circuit in *Jones* v. *Tannah*, 186 F. 2d 445, lead inevitably to the conclusion that income such as that involved in this case is subject to the federal income tax.

C. FEDERAL TAXATION OF SUCH INCOME IS NOT INCONSISTENT WITH AN ULTIMATE TRANSFER TO THE INDIANS OF ALLOTTED LANDS "FREE OF ALL CHARGE OR INCUMBRANCE WHATSOEVER"

1. The tax will not dimish the value of the corpus of the trust property

The decisions of the courts below (R. 55-59) are based on the proposition that the imposition of a tax on income from the sale of timber would somehow diminish the value of the trust property which the United States is obliged to turn over to the Indians at the conclusion of the trust period. Cf. Chief Judge Phillips' dissent in *Jones* v. *Tannah*, 186 F. 2d at 449. This proposition is patently fallacious for it ignores the fact that the cutting and sale of timber is an income-producing operation carried on with the consent of the allottee-Indians and for their benefit, and it further overlooks the fact that the tax laws recognize that the removal of timber constitutes in part a wasting of the capital asset and contain special provisions to exclude from tax such portion of the proceeds of the sale of timber as represents such waste.

the trust period. While the Internal Revenue Code provides for the creation of a lien in favor of the United States for unpaid taxes on all property of a taxpayer (Section 3670), it is at least doubtful that this provision would prevail against the specific undertaking of the United States contained in the General Allotment Act to convey allotted lands at the conclusion of the trust period "free of all charge or incumbrance whatsoever".[12] But that question is not here presented. Should the United States ever attempt to assert such a lien against allotted land, it will be time enough to consider the question of its validity.

In any event, the fact that the United States may be precluded from enforcing such a lien would not defeat the tax itself. A restriction on the manner of collecting a tax should not be confused with the authority of the United States to impose it. The fact that the United States may have precluded itself from one of the remedies elsewhere available to enforce collection of delinquent taxes cannot be equated with an intent to forego the imposition of the tax itself. Indeed, the contention that the federal tax cannot be imposed on the income from allotted lands because of the possibility that a lien for unpaid

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[12] See also the Act of May 8, 1906, amending Section 6 of the General Allotment Act (App. pp. 42–43), providing that restricted land shall not be liable to the satisfaction of any debt contracted prior to the issuance of a fee simple patent.

a. The income tax laws contain special provisions to exclude from tax such portion of the proceeds of the sale of timber as represents a wasting of the capital asset

No portion of the income tax here imposed can be regarded as being paid out of the corpus of the trust property. The tax imposed is on the *net* income from the sale of timber and not on the entire proceeds realized from the cutting and sale of the standing timber as such. The cutting and sale of timber is of course partly an income-producing operation and partly a wasting of a capital asset, the standing timber. It is a matter of common knowledge that the value of timber standing on the land is less than the value of the timber when it is cut for sale. As was said in *Stratton's Independence* v. *Howbert*, 231 U. S. 399, 415, 416:

> * * *, it is of course true that the revenues derived from the working of mines result to some extent in the exhaustion of the capital. * * *
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> * * * The conduct of such business results in profit, for it cannot be seriously contended that the ores are not worth more at the mine mouth than they were worth in the ground, *plus* the cost of mining.

While the *Stratton's* case dealt with the mining of ores, the cutting and sale of timber results in a similar, simultaneous production of profit and exhaustion of capital.

To compensate for the loss or waste of the capital asset consumed in the production of in-

taxes might be imposed on the property proves too much. Indians who have a beneficial interest in allotted trust lands may also receive income from other taxable sources. It could hardly be contended that such other income is also tax exempt on the ground that, if the tax is not paid, a lien might be asserted against lands allotted to the Indians concerned.[13] As respondent (Br. in

[13] The confusion between nontaxability of income and the inability of the United States to impose a lien on allotted trust property is illustrated by *Nicodemus* v. *United States*, 132 F. Supp. 608 (D. Idaho), now on appeal to the Ninth Circuit. In that case, a Coeur d'Alene Indian woman received rental in crops and cash from restricted lands, part of which lands were allotted to her and part of which were inherited. When she refused to file income tax returns for 1946 and 1947, the Deputy Collector for the District of Idaho prepared and filed returns for her. The taxes due were collected by means of a lien filed against funds due the taxpayer from her lessee. Relying on the opinion of the court below in the instant case, the District Court held that the income was tax exempt, although its first opinion, rendered after the opinion of the District Court below but prior to that of the Ninth Circuit, had been in favor of the Government. See memorandum opinion of December 15, 1954 (1954 P-H, par. 72,923). Although a lien was filed neither against the taxpayer, nor against her restricted lands, the District Court in its latest decision reasoned that the Indian could lose her allotment through failure to pay the tax, saying (132 F. Supp. at 610)—

> it cannot be questioned that if the income tax is assessed against them [the Indians], and is not paid, it would become a lien upon their lands and would not be "free of all charge or incumbrance whatsoever".

The court made no distinction between the lands inherited and those as to which Mrs. Nicodemus was the original allottee, although it recognized that even the dissenting judge in the *Tsaynah* case would have held income derived from in-

come, Section 23 (m) of the Code (App. p. 37) allows a deduction for the depletion of timber as well as of various kinds of mineral ores, oil and gas. See *Anderson* v. *Helvering*, 310 U. S. 404, 408. The purpose of this deduction is to return to the owner of the land tax-free the amount by which his capital investment is diminished by the cutting of the timber. See *United States* v. *Ludey*, 274 U. S. 295, 302.

Congress, it will be noted, has granted a special election (Code Section 117 (k), App. p. 38) in the case of taxpayers who cut and sell timber, permitting them to treat the transaction as though it were a sale of a capital asset (rather than an ordinary income-producing operation, which it is in the absence of such election). See S. Rep. No. 627, 78th Cong., 1st Sess., pp. 25–26. Where such an election is made, a taxpayer is permitted to recoup his investment tax free since the amount of gain is computed by deducting the "adjusted basis for depletion of such timber" from the fair market value of such timber. This election was made on behalf of taxpayers in this case, with taxpayers' consent (R. 18), undoubtedly because the reporting officer and taxpayers deemed it to taxpayers' advantage to do so. Taxpayers had no actual cost basis, so that the adjusted basis deducted in computing their gain (R. 20) was the value on March 1, 1913, the effective date of the federal income tax. See Code Sections 113 (a) (19) and 114 (b).

Thus the full March 1, 1913, value of the property, to the extent that it was converted into cash by the sale, has been returned to the taxpayers, or to the Indian Agency for their account, undiminished by the tax. All that has been taxed is the profit or increment in value. In view of taxpayers' voluntary election, it cannot be assumed that the tax paid was in excess of that which would have been paid if computed on the basis of the net income derived wholly from taxpayers' income-producing operation—the cutting and sale of timber.[7]

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[7] The election afforded by Section 117 (k) (which was added by Section 127 of the Revenue Act of 1943, c. 63, 58 Stat. 21), which gives taxpayers the option of treating the ordinary income operation incident to the cutting and sale of timber as though it were gain from the sale of a capital asset, was plainly misunderstood by the trial court and was one of the reasons why *Jones* v. *Tauñah*, *supra*, was thought to be distinguishable (R. 56–57). Although the Court of Appeals, in recognizing that *Jones* v. *Tauñah* was not distinguishable (R. 59), did not share that misunderstanding, the taxpayers have amplified on and compounded the confusion by posing a second question in their brief in opposition (p. 2), and by extending an argument, the thesis of which seems to be that they (p. 9) "have not yet received their capital upon which to make a gain."

The answer to such an argument, should it be repeated in taxpayers' brief on the merits, is clear. (1) The cutting and sale of timber is an ordinary income-producing operation, in which the depletion deduction affords ample recognition of the capital consumed in the earning of the income. (2) The special treatment afforded by Section 117 (k) for taxpayers who elect its provisions does not change the fundamental nature of the income. (3) At all events, even if the trans-

b. The sale of the timber was authorized by statute for the benefit of the Indians and itself produced income

The suggestion of the court below (R. 59) that the Indian-taxpayers have somehow been wronged by the timely sale of timber on their behalf and with their consent and the assessment of federal taxes on the net income derived therefrom does not stand analysis. It is not clear whether the courts below thought that the Department of the Interior had no right to convert the timber into cash or whether they thought that the taxpayer should receive the cash equivalent of the value of the timber as of the end of the trust period. There is no basis for either view. The sale was fully authorized by Congress and was approved by taxpayers. The value which the standing timber would have as of some date in the future if it had not been cut and sold could not of course be determined because of unknown factors affecting value in the future. Thus, it cannot be said that the value excluded from tax is not at least the equivalent of what would have been the value at the end

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actions here were analogous to a sale of part of an interest in a capital asset, recognition of gain is not postponed until the entire capital investment is returned tax free; instead, an aliquot portion of basis is deducted against the sale proceeds to determine present gain. *Avery* v. *Commissioner*, 11 B. T. A. 958, 961. Taxing the gain in the present case as it is realized is not inconsistent with any obligation of the United States and these Indians are not entitled to any better treatment than is accorded to other taxpayers who own timber lands and who are taxed with income as it is realized.

of the trust period if the timber had not been cut. Indeed the timber could well have been less valuable in the future for many reasons, as, for example, over maturity, or if it had been destroyed by disease, fire, or other hazard.

The taxpayers have not questioned the legality and desirability of the sale of their timber prior to the expiration of the trust period, and indeed they could not since they expressly approved the contract for sale of their timber (R. 36). As to legality, Congress specifically authorized the sale of timber on allotted lands in Section 8 of the Act of June 25, 1910 (App. p. 43) which provides:

> * * * the timber on any Indian allotment held under a trust or other patent containing restrictions on alienations, may be sold by the allottee with the consent of the Secretary of the Interior and the proceeds thereof shall be paid to the allottee or disposed of for his benefit under regulations to be prescribed by the Secretary of the Interior.

Subsequently, by the Act of March 4, 1933 (App. p. 44), the Secretary of the Interior was given authority by Congress to modify the terms of then existing contracts for the sale of timber on all allotted Indian land when it was in the interest of the Indians; and by the Act of June 6, 1934 (App. p. 44), the Secretary of the Interior was specifically authorized to modify the terms of existing contracts for the sale of timber on the Quinaielt Indian Reservation when it was in the interest of the Indians.

The Secretary of the Interior has promulgated General Forest Regulations and General Timber Sale Regulations, which set forth the general objectives in the sale of timber on Indian lands, and prescribe provisions that must be incorporated in all contracts that may be entered into to carry out those objectives. 25 Code of Federal Regulations, Parts 61 and 296 (App. pp. 46–50); Form 5–502, General Timber Sale Regulations (App. pp. 50–51). The objectives generally are the preservation and cutting of the forest lands so as to keep them in a perpetually productive state, the sale of such timber as is necessary to aid development by Indians and to prevent loss, and the management of the land to minimize erosion. Sec. 61.1. Thus, in the Regulations the Secretary of the Interior has considered both the ultimate benefit and the immediate advantage to the Indian allottees. Restrictions are imposed on cutting timber so as to protect reserve stands, to promote a sustained yield and for soil conservations. Secs. 61.2, 61.3, 61.5, and 61.11. See also General Timber Sale Regulations, pars. 9, 10, 13 (App. pp. 50–51) which were incorporated into all contracts for the sale of timber. Sales amounting to more than $100 from allotted lands will not be authorized until a qualified forest officer has examined the timber and submitted a report to the officer authorized to approve the timber contracts. Sec.

61.13. There are other detailed regulations designed to protect the Indians.[8]

As to desirability of the sale, it obviously was to the advantage of the taxpayers to derive a financial benefit from their timber land and it may well have been necessary, for any number of reasons, that the timber sold by them be cut at once. See Secs. 61.1 and 61.2 of the General Forest Regulations, giving priority in cutting to stands of timber deteriorating as the result of fire damage, disease, insect infestation, overmaturity, and other causes, and requiring rapid cutting to prevent loss. See also Act of February 16, 1889, c. 172, 25 Stat. 673.

In the light of the Act and the Regulations issued and followed by the Secretary of the Interior the only conclusion possible is that the value of the taxpayers' trust property was not diminished by the sale of the original standing timber; instead, it almost certainly was increased. In any event, the sale of timber was authorized by Congress and approved by the taxpayers, who

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[8] In *United States* v. *Eastman*, 118 F. 2d 421 (C. A. 9th); certiorari denied, 314 U. S. 635, it was held that the Secretary of the Interior had the right to enforce his regulations with respect to the sale of timber on the Quinaielt Reservation, in spite of the Indians' objection to provisions for their protection in regard to selective logging and the stimulation of young growth. Other cases discussing these timber contracts are *United States* v. *Alaska Lumber Co.*, 305 U. S. 415; *Polley's Lumber Co.* v. *United States*, 115 F. 2d 751 (C. A. 9th); *United States* v. *Harris*, 109 F. 2d 268 (C. A. 9th), rehearing denied, 103 F. 2d 1020.

have or will receive in the form of cash or financial benefits the full proceeds of the sale diminished only by a tax on the net income derived therefrom.

c. A tax on income derived from the sale of timber is not the equivalent of a tax on the land itself

The courts below appear to have viewed (R. 55–59) the tax on income from the sale of timber as the equivalent of a tax on the land itself, and thought that, for that reason, the tax was contrary to the obligations of the United States to the Indians concerned. Implicit in this reasoning is the unacceptable premise that a tax on income derived from land is the equivalent of a tax on the land itself. But the once current theory that the taxation of income is the same as the taxation of the source of the income has now been fully discredited. *Graves* v. *N. Y. ex rel. O'Keefe*, 306 U. S. 466, 480–481, and cases cited. That discarded theory, which is no longer valid to supply an implied constitutional immunity, ought not to be resurrected to imply a treaty or statutory immunity. Cf. *Oklahoma Tax Comm'n* v. *Texas Co.*, 336 U. S. 342, 366, rehearing denied, 336 U. S. 958.

A tax on the income from property is not to be regarded as a tax on the property itself. In *N. Y. ex rel. Cohn* v. *Graves*, 300 U. S. 308, the power of the state to tax its citizens on income from property located outside the state was upheld, the Court rejecting (*id.* at 314) "the

contention that a tax on income is a tax on the land which produces it," saying (*ibid.*), "The incidence of a tax on income differs from that of a tax on property." The Court concluded that (*id.* at 316) "the receipt of income by a resident of the taxing state * * * is within its taxing power, even though derived from property beyond its reach." Again, in *Hale* v. *State Board*, 302 U. S. 95, it held that a state may validly impose an income tax on interest derived from bonds even though, by state statute, it had been expressly provided that the bonds should be exempt from tax. The levying of an income tax was considered not to be an impairment of the state's contract not to tax the bonds themselves. Cf. *Graves* v. *N. Y. ex rel. O'Keefe*, 306 U. S. 466.

Consequently, the imposition of a federal tax on income from allotted trust lands cannot be considered to be a violation of any undertaking by the United States even if that undertaking be viewed as one inconsistent with the imposition of a direct tax on those lands. Indeed, even if the United States were prohibited from imposing a direct tax on the property, it would not be precluded from imposing an income tax on the gain derived from a sale of the property. Cf. *Willcuts* v. *Bunn*, 282 U. S. 216; *United States* v. *Stewart*, 311 U. S. 60. The present case, where the land itself has not been sold and where all that is being taxed is the income derived from the sale

of timber cut from the land, is a clearer one for the application of the tax.

In *West* v. *Oklahoma Tax Comm'n,* 334 U. S. 717, rehearing denied, 335 U. S. 838, notwithstanding that the property was being held in trust by the United States for Indians, the Court held that a state was not precluded from imposing an inheritance tax on the transfer of such property. A similar holding was made in *Oklahoma Tax Comm'n* v. *United States,* 319 U. S. 598, with respect to restricted property which could not be freely alienated or used by the Indians without the approval of the Secretary of the Interior. And in *Landman* v. *Commissioner,* 123 F. 2d 787 (C. A. 10th), certiorari denied, 315 U. S. 810 (which was cited with approval in *Oklahoma Tax Comm'n* v. *United States, supra,* 319 U. S. at 608), it was held that the federal estate tax was applicable even though the decedent's estate included restricted funds derived from property which, under the treaty involved in that case, had been expressly exempted from tax. We submit, therefore, that the fact that the income was derived from trust property does not imply tax exemption.

The District Court was also influenced by its conclusion that the sale of standing timber is the same as a sale of part of the land (R. 43). The taxing statute, however, contains its own standards and it matters not how local law regards the matter. *Watson* v. *Commissioner,* 345

U. S. 544, 551; *Burnet* v. *Harmel*, 287 U. S. 103. As we have seen, moreover, the tax would be no less valid even if it were viewed as imposed on the gain derived from a sale of part of the real estate.

Furthermore, although we do not believe that it is material to the ultimate issue, the view is warranted that the taxpayers sold cut timber rather than standing timber. The contract provided that the timber was not to be paid for until *after it had been cut* (R. 36). The General Timber Sale Regulations, incorporated into each contract, provided that title to the forest products covered by any contract will not pass until after they are paid for (par. 6, App. p. 50); and that if the forest products are not removed within the time specified, title will revert to the vendor, notwithstanding that the purchaser may have paid for the timber (par. 44, App. p. 51).[16] In *Wilson* v. *Cook*, 327 U. S. 474, this Court sustained a state tax imposed on persons engaged in severing timber as applied to a taxpayer having a contract to purchase and sever timber from national forest reserves owned by the United States. The tax was not considered as being imposed on the property of the United States. Cf. *Waples* v. *Sergeant*, 120 Wash. 63, 206 Pac. 945.

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[16] See 25 Code of Federal Regulations, Sec. 296.2; and Form 5–502, General Timber Sale Regulations, both quoted in App. pp. 50–51.

We submit, accordingly, that the cutting and sale of standing timber does not result in a diminution of the trust property and that the imposition of a tax on the profit realized in the process of cutting and selling the timber is not a diminution of the trust property or its proceeds. Consequently, no matter how broad may be the obligation of the United States with respect to the property, the imposition of a tax on the profit realized from the property cannot be viewed as in violation of or inconsistent with its undertaking. See *Willcuts* v. *Bunn*, 282 U. S. 216; *United States* v. *Stewart*, 311 U. S. 60.

The history of the imposition of the income tax on the salaries of federal judges in office provides an instructive analogy. Article III, Section 1 of the Constitution provides that the compensation of federal judges "shall not be diminished during their Continuance in Office." In *O'Malley* v. *Woodrough*, 307 U. S. 277, it was held that an income tax could validly be applied to judges taking office after the enactment of the statute, and *Miles* v. *Graham*, 268 U. S. 501, to the extent inconsistent, was overruled. During the pendency of the *Woodrough* case, Congress, in Section 3 of the Public Salary Tax Act of 1939, c. 59, 53 Stat. 574, expressly provided that the salaries of federal judges taking office before that date should thereafter also be subject to tax. In *Baker* v. *Commissioner*, 149 F. 2d 342 (C. A. 4th), this pro-

vision was upheld with respect to a federal judge who had taken office in 1921 when the then statute purported to tax the income of federal judges. Since that time, no other federal judge who was appointed prior to the Public Salary Tax Act of 1939 but who, unlike Judge Baker, took office when the statute did not purport to tax his salary, has raised any question concerning the constitutional validity of the tax on his salary even though this Court has never had the direct opportunity of reexamining *Evans* v. *Gore*, 253 U. S. 245.[11] Congress has further indicated its understanding that the imposition of the tax does not violate this constitutional provision by omitting any special reference to the salary of federal judges in the 1954 Code (see Section 61 (a)) and by stating that their income "will continue to be taxed in the same manner as that of other taxpayers." H. Rep. No. 1337, 83d Cong., 2d Sess., p. A19; S. Rep. No. 1622, 83d Cong., 2d Sess., p. 168. No reason suggests itself why Congress would have intended or should be required to be more solicitous of the income from allotted trust property of Indians. We believe, consequently, that it cannot be successfully contended that the tax in question is an invalid diminution of the

[11] In the *Baker* case, the tax rates imposed during the taxable years 1939 through 1941 were much greater than the tax rates in effect when Judge Baker took office. Nevertheless, his salary was not considered to have been diminished by such an increase in rates.

trust property, regardless of how broad is the obligation of the United States.

2. Since the tax would be paid on behalf of taxpayers by a Government agency at the time the income is received, it would not become a charge or encumbrance on the land at the end of the trust period

Taxpayers urged in the court below that an exemption from income tax must be implied since otherwise income taxes unpaid at the time the fee patent is issued would constitute a charge upon the land contrary to the obligation of the United States to deliver the trust property free of all charges. This argument is plainly without substance.

At the outset it should be noted that the argument is largely hypothetical, at least as applied to these Indians. During the trust period, all income derived from the allotted trust lands is received by the Taholah Indian Agency, as it was in the instant case (R. 40), and held by it subject to disbursement for the Indian's account under the supervision and control of the Secretary of the Interior. Since the income tax is paid on behalf of the Indian by a government agency when the income is received, the question as to the rights of the government in the event of nonpayment of income taxes due would not arise.

The question would arise only if income taxes due should remain unpaid at the conclusion of

App. 9) and the trial court (R. 57) recognize, it is now settled that such income is, notwithstanding this possibility, subject to tax.

We have seen that the imposition of the income tax here involved will not result in a diminution of the trust property, nor will it result in a charge on the property at the conclusion of the trust period. But even if it could be shown that the imposition of the tax might conceivably be payable in certain situations out of the corpus of the trust property or result in lien difficulties, these possibilities would not be sufficient to defeat the purpose of Congress to tax comprehensively the income of all. As this Court said in rejecting a similar argument as precluding the imposition of a state inheritance tax (*West* v. *Oklahoma Tax Commission*, 334 U. S. 717, 727):

> The result of permitting the imposition of the inheritance tax on the transfer of trust properties may be, as we have noted, to deplete the trust corpus and to create lien difficulties. But those are normal and intended consequences of the inheritance tax. And until Congress has in some affirmative way indicated that these burdens require

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herited lands taxable. Moreover the court overlooked the fact that the United States had asserted a lien only against money in the hands of taxpayer's lessee, and that accordingly the lands allotted to taxpayer and held in trust by the United States were not threatened.

that the transfer be immune from the inheritance tax liability, the *Oklahoma Tax Commission* case permits that liability to be imposed.

We conclude that the imposition of federal income taxes on income or gains derived from allotted trust lands is not inconsistent with the obligation of the United States to deliver the lands at the conclusion of the trust period free of any charge or encumbrance whatsoever.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals is erroneous, and should be reversed.

Respectfully submitted.

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DECEMBER 1955.

Internal Revenue Code of 1939:

SEC. 11 [As amended by Sec. 102, Revenue Act of 1942, c. 619, 56 Stat. 798]. NORMAL TAX ON INDIVIDUALS.

There shall be levied, collected, and paid for each taxable year upon the net income of every individual a normal tax of 6 per centum of the amount of the net income in excess of the credits against net income provided in section 25. (For alternative tax, if gross income from certain sources is $3,000 or less, see section 400.)
(26 U. S. C. 1952 ed., Sec. 11.)

SEC. 21. NET INCOME.

(a) *Definition.*—"Net income" means the gross income computed under section 22, less the deductions allowed by section 23.

* * * * * *

(26 U. S. C. 1952 ed., Sec. 21.)

SEC. 22. GROSS INCOME.

(a) *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service * * *, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

* * * * * *

(26 U. S. C. 1952 ed., Sec. 22.)

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * * * *

(m) *Depletion.*—In the case of * * * timber, a reasonable allowance for depletion and for depreciation of improvements, according to the peculiar conditions in each case; * * *

* * * * * *

(26 U. S. C. 1952 ed., Sec. 23.)

SEC. 113. ADJUSTED BASIS FOR DETERMINING GAIN OR LOSS.

(a) *Basis (Unadjusted) of Property.*—The basis of property shall be the cost of such property; except that—

* * * * * *

(14) *Property acquired before March 1, 1913.*—In the case of property acquired before March 1, 1913, if the basis otherwise determined under this subsection, adjusted (for the period prior to March 1, 1913) as provided in subsection (b), is less than the fair market value of the property as of March 1, 1913, then the basis for determining gain shall be such fair market value. * * *

* * * * * *

(b) *Adjusted Basis.*—The adjusted basis for determining the gain or loss from the sale or other disposition of property, whenever acquired, shall be the basis determined under subsection (a), adjusted as hereinafter provided.

* * * * * *

(26 U. S. C. 1952 ed., Sec. 113.)

SEC. 114. BASIS FOR DEPRECIATION AND DEPLETION.

* * * * *

(b) *Basis for Depletion.*—

(1) *General rule.*—The basis upon which depletion is to be allowed in respect of any property shall be the adjusted basis provided in section 113 (b) for the purpose of determining the gain upon the sale or other disposition of such property, except as provided in paragraphs (2), (3), and (4) of this subsection.

* * * * *

(26 U. S. C. 1952 ed., Sec. 114.)

SEC. 117. CAPITAL GAINS AND LOSSES.

* * * * *

(k) [As added by Sec. 127 (a), Revenue Act of 1943, c. 63, 58 Stat. 21] *Gain or Loss Upon the Cutting of Timber.*—

* * * * *

(2) In the case of the disposal of timber (held for more than six months prior to such disposal) by the owner thereof under any form or type of contract by virtue of which the owner retains an economic interest in such timber, the difference between the amount received for such timber and the adjusted depletion basis thereof shall be considered as though it were a gain or loss, as the case may be, upon the sale of such timber.[11]

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[11] Section 127 (c) of the Revenue Act of 1943, *supra*, makes these provisions applicable to taxable years beginning after February 28, 1913.

(26 U. S. C. 1952 ed., Sec. 117.)

Treaty with the Qui-nai-elts, 12 Stat. 971:

Treaty between the United States and the Qui-nai-elt and Quil-leh-ute Indians. Concluded on the Qui-nai-elt River, in the Territory of Washington, July 1, 1855, and at the city of Olympia, January 25, 1856. Ratified by the Senate, March 8, 1859. Proclaimed by the President of the United States, April 11, 1859.

* * * * *

WHEREAS, a treaty was made and concluded on the Qui-nai-elt River, in the Territory of Washington, on the first day of July, one thousand eight hundred and fifty-five, and at the city of Olympia also in said Territory, on the twenty-fifth day of January, one thousand eight hundred and fifty-six, between Isaac I. Stevens, governor and superintendent of Indian affairs in the Territory aforesaid, on the part of the United States, and the hereinafter-named chiefs, headmen, and delegates of the different tribes and bands of the Qui-nai-elt and Quil-leh-ute Indians, on the part of said tribes and bands, and duly authorized thereto by them; which treaty is in the words and figures following, to wit:—

* * * * *

ARTICLE I. The said tribes and bands hereby cede, relinquish, and convey to the United States all their right, title, and interest in and to the lands and country occupied by them, bounded and described as follows: * * *

ARTICLE II. There shall, however, be reserved, for the use and occupation of the tribes and bands aforesaid, a tract or tracts of land sufficient for their wants within the

Territory of Washington, to be selected by the President of the United States, and hereafter surveyed or located and set apart for their exclusive use, and no white man shall be permitted to reside thereon without permission of the tribe and of the superintendent of Indian affairs or Indian agent. And the said tribes and bands agree to remove to and settle upon the same within one year after the ratification of this treaty, or sooner if the means are furnished them. In the mean time it shall be lawful for them to reside upon any lands not in the actual claim and occupation of citizens of the United States, and upon any lands claimed or occupied, if with the permission of the owner or claimant. * * *

* * * * *

ARTICLE V. To enable the said Indians to remove to and settle upon such reservation as may be selected for them by the President, and to clear, fence, and break up a sufficient quantity of land for cultivation, * * *

* * * * *

General Allotment Act of February 8, 1887, c. 119, 24 Stat. 388:

CHAP. 119.—An act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes.

SEC. 1. [As amended by Sec. 17, Act of June 25, 1910, c. 431, 36 Stat. 855] That in all cases where any tribe or band of Indians has been or shall hereafter be located upon any reservation created for their use by treaty stipulation, Act of Congress, or

executive order; the President shall be authorized to cause the same or any part thereof to be surveyed or resurveyed whenever in his opinion such reservation or any part thereof may be advantageously utilized for agricultural or grazing purposes by such Indians, and to cause allotment to each Indian located thereon to be made in such areas as in his opinion may be for their best interest not to exceed eighty acres of agricultural or one hundred and sixty acres of grazing land to any one Indian. * * *
(25 U. S. C. 1952 ed., Sec. 331.)

SEC. 5. That upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: *Provided,* That the President of the United States may in any case in his discretion extend the period. And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void: * * *

(25 U. S. C. 1952 ed., Sec. 348.)

SEC. 6. That upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law. And every Indian born within the territorial limits of the United States to whom allotments shall have been made under the provisions of this act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States, without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property. (25 U. S. C. 1952 ed.; Sec. 349.)

Act of May 8, 1906, c. 2348, 34 Stat. 182:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section six of an act approved February eighth, eighteen hundred and eighty-seven,

entitled "An Act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes," be amended to read as follows:

"SEC. 6. * * * That the Secretary of the Interior may, in his discretion, and he is hereby authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed and said land shall not be liable to the satisfaction of any debt contracted prior to the issuing of such patent: * * *"

* * * * *

(25 U. S. C. 1952 ed., Sec. 349.)

Act of June 25, 1910, c. 431, 36 Stat. 855:

* * * * * *

SEC. 8. That the timber on any Indian allotment held under a trust or other patent containing restrictions on alienations, may be sold by the allottee with the consent of the Secretary of the Interior and the proceeds thereof shall be paid to the allottee or disposed of for his benefit under regulations to be prescribed by the Secretary of the Interior.

* * * * * *

(25 U. S. C. 1952 ed., Sec. 406.)

Act of June 2, 1924, c. 233, 43 Stat. 253:

CHAP. 233.—An Act To authorize the Secretary of the Interior to issue certificates of citizenship to Indians.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all non-citizen Indians born within the territorial limits of the United States be, and they are hereby, declared to be citizens of the United States: *Provided*, That the granting of such citizenship shall not in any manner impair or otherwise affect the right of any Indian to tribal or other property.

Act of March 4, 1933, c. 275, 47 Stat. 1568:

AN ACT To authorize the Secretary of the Interior to modify the terms of existing contracts for the sale of timber on Indian land when it is in the interest of the Indians so to do.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That * * *

SEC. 2. The Secretary of the Interior may modify existing contracts between individual Indian allottees or their heirs and purchasers of their timber, under the terms and requirements of section 1 of this Act, with the consent of the allottee or his heirs.

* * * * *

Act of June 6, 1934, c. 407, 48 Stat. 910:

AN ACT To authorize the Secretary of the Interior to modify the terms of existing contracts for the sale of timber on the Quinault Indian Reservation when it is in the interest of the Indians so to do.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That * * *

SEC. 2. The Secretary of the Interior may modify existing contracts between in-

dividual Indian allottees or their heirs and purchasers of their timber, under the terms and requirements of section 1 of this Act, with the consent of the allottee or his heirs.

* * * * *

Act of June 18, 1934, c. 576, 48 Stat. 984:

AN ACT To conserve and develop Indian lands and resources; * * *

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That * * *

SEC. 2. The existing periods of trust placed upon any Indian lands and any restriction on alienation thereof are hereby extended and continued until otherwise directed by Congress.

* * * * *

(25 U. S. C. 1952 ed., Sec. 462.)

Treasury Regulations 111, promulgated under the Internal Revenue Code of 1939:

SEC. 29.23 (m)–20. *Capital Recoverable Through Depletion Allowance in Case of Timber.*—In general, the capital remaining in any year recoverable through depletion allowances is the basis provided by section 113 (a) adjusted as provided by section 113 (b). For capitalization of carrying charges, see section 29.113 (b) (1)–1. The apportionment of deductions between the several owners of economic interests in timber properties will be made as specified in section 29.23 (m)–7. The cost of timber properties shall be determined in accordance with the principles indicated in secsection 29.23 (m)–6. For method of determining fair market value and quantity of timber, see sections 29.23 (m)–25 to 29.23

(m)–27, inclusive. For depletion purposes the cost of the timber shall not include any part of the cost of the land.

25 Code of Federal Regulations (1949 ed.), c. 1:

PART 61—GENERAL FOREST REGULATIONS

SEC. 61.1 *Objectives.* The following objectives are to be sought in the management of Indian forests:

(a) The preservation of Indian forest lands in a perpetually productive state by providing effective protection, preventing clear cutting of large contiguous areas, and making adequate provision for new forest growth when the mature timber is removed.

(b) The regulation of the cut in a manner which will insure method and order in the harvesting of the tree capital, so as to make possible continuous production and a perpetual forest business.

* * * * *

(d) The sale of Indian timber in open competitive markets on reservations where the volume produced by the forest annually is in excess of that which is practicable of development by the Indians, or where fire damage, insect infestation, disease, overmaturity, or other causes require extensive and rapid harvesting of the timber in order to prevent loss.

* * * * *

(f) The management of the forest in such a manner as to retain its beneficial effect in regulating runoff and minimizing erosion.

SEC. 61.2 *Development restricted.* Proceeding in accordance with this general policy, the development of reservation timber will not be authorized until practical methods of cutting are prescribed which will assure the perpetuation of the forest, prevent unnecessary waste, and make possible effective protection against destructive agencies. Cutting will be given priority in those stands of timber which are deteriorating as the result of fire damage, disease, insect infestation, overmaturity, or other causes. Whenever practicable, from 25 to 60 percent of the merchantable timber volume will be left standing in order to protect the site, provide seed for a new stand, and make possible a second cut before the reproduction matures.

SEC. 61.3 *Cutting restrictions.* Clear cutting of large contiguous areas will not be permitted, except on lands which will be used for agricultural development. It is the policy of the Bureau to promote the use of logging methods which will insure a reasonable degree of protection for reserve stands and to limit the use of donkey engines and other high power machinery to areas upon which the use of animal or tractor logging is not feasible. Wherever circumstances necessitate the use of high power machinery which results in destructive logging, cuttings will be so broken up by stands of green timber as to secure adequate protection against fire and ample provision for reseeding the cut-over area.

* * * * *

SEC. 61.5. *Objectives to be expressed.* The Bureau is definitely committed to a policy of sustained yield forest management. This policy will be given practical expression through the medium of forest working plans for all reservations of major importance from an industrial forestry standpoint. Such working plans should contain a statement of how the policies of the Bureau are to be applied on a given Indian forest, with a definite program of action for a specified period in the future. These plans will express objectives to be attained in timber management, thus giving the necessary basis for consistent action over the long period necessary to grow a timber crop.

* * * * *

SEC. 61.11. *Sustained yield management.* No Indian timber may be developed either by Indians or by white men, unless it is operated on a sustained yield basis.

* * * * *

SEC. 61.13. *Timber sales from unallotted and allotted lands.* On reservations where the volume produced by the forest annually is in excess of that which is practicable of development by the Indians, or where the stand is rapidly deteriorating as a result of fire damage, insect infestation, disease, over-maturity, or other causes, the sale of Indian timber in open competitive markets will be authorized, provided consent is given by the Indians in general council or by their duly authorized representatives for tribal, and by the allottees for allotted timber. Sales from unallotted lands, allotted lands or a combination of these two

ownerships, having a stumpage value of over $100, will not be authorized until an examination of the timber to be sold has been made by a qualified forest officer and a complete report setting forth all pertinent information has been submitted to the officer or officers authorized to approve the contract as provided in § 61.20.

* * * * * * *

SEC. 61.18. *Contracts required.* For sales of timber of a stumpage value greater than $100 the regular contract forms must be used unless a special form for a particular sale is approved by the Commissioner of Indian Affairs or the Secretary of the Interior. The regular forms provide for a certain flexibility to meet variable conditions, but no essential departure from the fundamental requirements of such contracts may be authorized by a superintendent or other field officer. * * * when stumpage is purchased from allotted lands, Form 5–489 should be used. * * * When timber is cut from unallotted land or from an allotment held under a trust patent or other patent containing restrictions on alienation the contract should require that the proceeds be paid into the hands of the superintendent and an accounting be made therefor.

* * * * * * *

SEC. 61.28 *Soil conservation.* (a) Soil erosion constitutes a serious menace on many of the Indian forest lands. Its prevention should receive primary consideration in the management of Indian forests. Heavy cuttings should generally not be permitted on areas especially susceptible to erosion, and such cuttings as may be conducted should be governed by a maxi-

mum degree of care in the protection of the forest and ground cover. * * *

* * * * *

PART 296—LIST OF FORMS

* * * * *

SEC. 296.2. *Forestry forms.*

* * * * *

No. 5–489. Timber contract (allotted lands).

* * * * *

No. 5–502. General timber sale regulations incorporated into each timber contract.

* * * * *

Form 5–502, Department of the Interior, Bureau of Indian Affairs:

GENERAL TIMBER SALE REGULATIONS

* * * * *

4. *No timber* other than that sold may be cut by the purchaser on the sale area without a separate contract of sale therefor, and timber on allotments within a general sale area held under trust or restricted patents cannot be logged without a contract with the owners of the allotment approved by the proper officer.

* * * * *

6. *Title* to the forest products covered by any contract will not pass to the purchaser until such products are paid for.

* * * * *

9. *The areas* to be logged in any season may be designated by the officer in charge when in his judgment this is necessary to prevent deterioration from fire, worms, or other cause or to insure the logging of the sale unit in such manner as to fully

protect the interests of the United States and the Indians. When logging is begun on an allotment or natural logging unit, it will not be discontinued and started elsewhere without the written consent of the officer in charge.

10. *Selective logging*, or the logging of areas in such manner as to preserve a part of the merchantable timber, promote the growth of young trees, or preserve the forest cover, will be practiced on all lands chiefly suitable for the production of timber crops. * * *

* * * * * *

13. *Young growth* will be protected as far as possible in every branch of the logging operations, and its use in the construction of improvements may be restricted by the officer in charge.

* * * * * *

44. *If extension of time* to cut and remove the timber is not granted by the officer approving a contract, the purchaser can cut no timber after the expiration of the contract, but he may remove the timber, previously cut and paid for, within 1 year of the expiration of the contract. If not removed within the time allowed, the title will revert to the vendor notwithstanding the purchaser may have paid for the timber.

* * * * * *

The above General Timber Sale Regulations are hereby prescribed for use in all contracts for the sale of timber from Indian lands except as special provision shall be made by the Commissioner of Indian Affairs or the Secretary of the Interior in particular sales.

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OCTOBER TERM, 1955

CLARK SQUIRE, COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF WASHINGTON, PETITIONER

v.

HORTON CAPOEMAN AND EMMA CAPOEMAN, HIS WIFE

SUPPLEMENTAL MEMORANDUM FOR THE PETITIONER

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Solicitor General,
H. BRIAN HOLLAND,
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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 134

CLARK SQUIRE, COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF WASHINGTON, PETITIONER

v.

HORTON CAPOEMAN AND EMMA CAPOEMAN, HIS WIFE

SUPPLEMENTAL MEMORANDUM FOR THE PETITIONER

In the course of oral argument in this case on June 19, 1956, counsel for petitioner stated that from the enactment of the federal income tax law down to the present date, the Commissioner of Internal Revenue, with substantial consistency and except for a period following the issuance of certain opinions of the Attorney General in 1924–1925, has maintained the position that restricted income of Indians derived from restricted, allotted land (including gain realized upon the sale thereof[1]) is subject to the require-

[1] See, *e. g.*, Appendix, Enclosure 1, para. 7, pp. 14–15 and 2d para. p. 19, *infra*; *Dick* v. *Commisisoner*, 76 F. 2d 265 (C. A. 10), certiorari denied, 296 U. S. 588.

373490—56——1

ments of the federal income tax laws, in the absence of a specific statutory exemption from tax.

In answer to a question whether the administrative materials to which counsel referred had been dealt with in the Government's brief, counsel invited the Court's attention to the references cited at page 16, footnote 6, of the brief. The following more complete statement of the administrative history is submitted in the belief that it may prove helpful to the Court.

From the enactment of the federal income tax law in 1913 until 1924, the Commissioner of Internal Revenue took the position that Indians were taxable on income from restricted, allotted lands, except to the extent that such income was derived from land which Congress had explicitly declared shall not be subject to taxation.[2]

In 1924 and 1925, the Attorney General ruled broadly, in a series of opinions, that income from restricted lands should be considered exempt from the federal income tax on the ground that taxation of such income was inconsistent with the status of the Indians as wards of the Nation.[3]

[2] See Appendix, entries for 1914–1923, pp. 7–8, *infra*.

[3] See e. g., 34 Op. A. G. 459 (1925) (Quapaw Indians held exempt from tax on income from restricted, allotted lands (not subject to specific tax exemption)). See further 34 Op. A. G. 275 (1924) (liability of members of Five Civilized Tribes for taxes on income from homestead and other restricted, allotted land); 35 Op. A. G. 1 (1925) (Kansas Indians held non-taxable on income from allotted, restricted lands, following ruling as to Quapaw Indians); 35 Op. A. G. 107 (1926) (income of Hopi Indians from graz-

The Commissioner of Internal Revenue never accepted the broad rationale of these opinions.[4] Only two of the opinions were published as Treasury Decisions,[5] and these were apparently regarded as controlling only as to the particular tribes involved and only as to the particular types of income with which they were concerned.[6]

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ing cattle and sheep on unallotted tribal lands, and income from operation of trading post held exempt from tax) (cf. S. M. 4527, IV–2 Cum. Bull. 29 (1925), which had held such income taxable).

[4] For a discussion of the Treasury position following the issuance of the above-cited opinions of the Attorney General, see Brief for the Respondent, *Superintendent* v. *Commissioner*, No. 817, O. T. 1934, pp. 22–32. See further the argument there made to the effect that even the express exemptions from tax found in some statutes have reference only to taxation by the states, and not to taxation by the federal government, *Id.* at pp. 12–16, 24–26.

[5] 34 Op. A. G. 275 was published as T. D. 3570, III–1 Cum. Bull. 85; 34 Op. A. G. 439 was published as T. D. 3754, IV–2 Cum. Bull. 37.

[6] For example, the Commissioner continued to assert that the restricted income of Osage Indians in the form of oil and gas royalties from restricted mineral interests was taxable. *E. g.*, *Appeal of Leah Brant*, 5 B. T. A. 134 (1926); *Mary Blackbird*, 14 B. T. A. 1247 (1929), reversed, 38 F. 2d 976 (C. A. 10).

[7] For example, the Commissioner asserted that income from the reinvestment of royalty income received by a Creek Indian (member of one of the Five Civilized Tribes) from allotted, restricted, tax-exempt homestead lands was taxable. *Snell* v. *Commissioner*, 10 B. T. A. 1081 (1928). See further G. C. M. 9621, X–2 Cum. Bull. 111 (1931). Following this Court's opinion in *Shaw* v. *Gibson-Zahniser Oil Corp.*, 276 U. S. 575, the Commissioner asserted that restricted income from restricted, allotted land was taxable where the Indian owner was a purchaser thereof and not the original allottee

Meanwhile the Commissioner of Internal Revenue, with gratifying success, looked to the courts to vindicate his position. See, e. g., *Choteau* v. *Burnet*, 283 U. S. 691; *Superintendent* v. *Commissioner*, 295 U. S. 418. Following this Court's decision in the latter case, the Commissioner in 1936 reasserted his position that income of all Indians from restricted, allotted lands was taxable unless expressly exempted from tax, a position which he has since consistently maintained.[8]

For the convenience of the Court, the principal rulings of the Commissioner dealing with the taxability of restricted income derived from restricted Indian lands are listed chronologically in the Appendix, *infra*, pp. 7–11.

At the close of the argument, one member of the Court invited counsel's attention to the statement in the "Handbook of Indian Law," prepared by the Solicitor of the Department of Interior in 1940, that (p. 265): "It is clear that the exemption accorded tribal and restricted Indian lands extends to the income derived directly therefrom." If this is read as a statement that all restricted income derived directly from restricted Indian lands is non-taxable (as its context suggests), it would appear that the author not only ignored the authoritative rulings of the Commis-

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or an heir of the original allottee. G. C. M. 6020, VIII–1 Cum. Bull. 63 (1929). Compare G. C. M. 2056, VI–2 Cum. Bull. 65 (1927).

[8] See Appendix, entries for 1936 to 1954, pp. 9–11, *infra*.

sioner of Internal Revenue[9] and the current instructions of the Department of the Interior to Indian Superintendents in the field,[10] but cited in support of his position only materials which then had no current vitality, including an opinion of the Attorney General issued in 1925 that had been explicitly overruled by the Attorney General in 1937 as inconsistent with intervening decisions of this Court;[11] and a court of appeals' decision which has been explicitly rejected by this Court as unsound.[12] In the light of these considerations, the above-quoted expression of opinion in the "Handbook" must either be construed as having reference only to income from lands expressly declared exempt from tax by statute, in which event it has no bearing on the issue presented by this case, or it must be rejected as inaccurate and entitled to no weight as evidence of contemporaneous administrative practice.[13]

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[9] See Appendix, entries for 1936 to 1937, pp. 9–10, *infra*.

[10] Dept. of Interior, Office of Indian Affairs, Misc. Cir. 3240, March 11, 1938 (Appendix, Enc. 2, *infra*, p. 23).

[11] T. D. 3754 (34 Op. A. G. 439 (1925)), overruled by 39 Op. A. G. 107 (1937), 1937–2 Cum. Bull. 61.

[12] *Blackbird* v. *Commissioner*, 38 F. 2d 976 (C. A. 10). In *Superintendent* v. *Commissioner*, 295 U. S. 418, 419–420, the Court referred to the rationale of the *Blackbird* case and said that the court of appeals had "properly declined to follow [this] pronouncement".

[13] The "Handbook" did not purport to be an official Departmental document. As the Secretary of Interior said in his foreword to the book: "This Handbook of Federal Indian Law should give to Indians useful weapons in the continual struggle that every minority must wage to maintain its lib-

With respect to all other income involved, as set forth in your letter of the 12th instant, it appears that the relation of the Interior Department to the Osage Indians is that of a fiduciary and when a distributable interest of any Indian in such funds from March 1 to December 31, 1913, amounts to $2,500, a fiduciary return of income should be made on form 1041. A return being made, the respective interests of all beneficiaries should be shown. It appearing that there is warrant of law for paying income of minor children to the parents of such children, when that fact obtains, the income of the child so paid to the parent should be accounted for as income of the parent.

As to profits from the sale of land: Take the appraised value of the land at the time of allotment, and if appraisement was not had, then what shall be determined as being the fair value of the land at that time. This value deducted from the sale price within the taxable period will be the measure of profit, as the land has been exempt from taxation. Prorate this profit in proportion of the whole time to the taxable time, taking 1913 as one year.

Your attention is invited to letter of this Department of February 6, 1914, in matter of taxability of royalties accruing to individual members of the Five Civilized Tribes of Indians in Oklahoma. The statement of law and regulations as contained in said letter applies in the instances here stated wherein it is the duty of the Interior Department to act for the Osage Indians.

Decisions, United States vs. Rickert (188 U. S., 432), and United States vs. Thurston County (143 Federal Report, 287), have been considered,

We conclude that the Commissioner of Internal Revenue has, since the enactment of the federal income tax laws in 1913 (except to the extent above noted during the period 1925–1936), maintained the position that income of Indians such as that involved in this case is subject to the federal income tax.

Respectfully submitted.

SIMON E. SOBELOFF,
Solicitor General.
H. BRIAN HOLLAND,
Assistant Attorney General.
CHARLES F. BARBER,
Assistant to the Solicitor General.
HILBERT P. ZARKY,
CAROLYN R. JUST,
Attorneys.

JANUARY 1956.

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erties * * *. Whatever legal force [this work] will have must be derived from the original authorities which have been assiduously gathered and patiently analyzed" (*id.*, at pp. v–vi).

and are held to have no bearing upon the taxability of income here involved.

It is proper to add that in matter of distributive interests of these individual Indians, only such portion thereof as shall be applicable to the period March 1 to December 31, 1913, is to be considered for income tax purposes in the returns of income now due.

Respectfully,

C. S. HAMLIN,
Acting Secretary.

TREASURY DEPARTMENT
WASHINGTON

FEBRUARY 6, 1914.

The Honorable
The Secretary of the Interior.

SIR: This department is in receipt of your letter of the 4th instant, calling attention to a letter written by your department under date of December 15, requesting an opinion of this office as to the following propositions:

> 1. Whether royalties arising from oil, gas and other mineral leases made by or on behalf of individual members of the Five Civilized Tribes of Indians in Oklahoma in or upon restricted lands held in severalty by said individuals; are subject to the provisions of the income tax law?
>
> 2. Whether the Superintendent of the Union Agency, or the lessee, is the "source" for withholding purposes; and if the Union Agency is the "source," should the Superintendent of said Agency ascertain and deduct the amount of depreciation of the mines, etc., not exceeding five per cent, as provided in the income tax law?

APPENDIX

ADMINISTRATIVE RULINGS RELATING TO TAXATION OF INCOME DERIVED BY INDIANS FROM RESTRICTED ALLOTTED LANDS

A. *First Period* (1913–1924)

1914 Information regarding applicability of federal income tax laws to Indians promulgated to Superintendents in charge of Indians. Dept. of Interior, Office of Indian Affairs, Circular No. 835, March 7, 1914 (Encl. 1, *infra*, pp. 11–22).

1921 Penalties will not be assessed for delinquencies in income tax returns filed by the United States for restricted Indians in view of the fact that the penalty provisions of the law are not operative against the government (5 Cum. Bull. 237).

1922 Restricted income in the form of rents and royalties from mining lease on restricted allotted land of a Quapaw Indian constitutes taxable income (I-1 Cum. Bull. 64).

Income tax returns should be filed and the tax due thereon should be paid by the Office of Indian Affairs for Indians whose property is under its control (I. T. 1366, I-1 Cum. Bull. 242).

1923 Income of any sort derived by Quapaw Indians from their restricted allotted lands constitutes taxable income (II–2 Cum. Bull. 55).

Income of Osage Indians from restricted "surplus allotments" is subject to tax; income from homestead allotments is exempt from taxation in view of 41 Stat. 1249, 1250, which

provides: "the homestead allotments of all the members of the Osage Tribe should not be subject to taxation, if held by the original allottee, prior to April 8, 1931" (II–2 Cum. Bull. 62).

B. *Period influenced by Attorney General's Opinions* (1924–1935)

1924 Attorney General ruled (34 Op. A. G. 275) that specific exemptions from tax granted to certain of the Five Civilized Tribes on homestead allotments constitute vested property rights. Income received from other restricted lands is tax exempt until the restrictions on the land are removed by act of Congress or by action of the Secretary of the Interior (T. D. 3570, III–1 Cum. Bull. 85).

1925 Attorney General ruled (34 Op. A. G. 439) that income of Quapaw Indians from restricted, allotted lands is not subject to the federal income tax laws, taxation of this income being inconsistent with the status of the Indians as wards of the Nation (T. D. 3754, IV–2 Cum. Bull. 37).

1926 Income of Ponca Indians directly derived from land allotted under General Allotment Act of 1887 held non-taxable following the above-cited Attorney General's opinion (S. M. 5632, V–1 Cum. Bull. 193).

1928 Income from allotted lands held by Creek Indians, as to which restrictions on alienation had been removed, is subject to federal income taxation, the Act of April 26, 1906 (34 Stat. 137, 144), providing that: "All lands upon which restrictions [on alienation] are removed shall be subject to taxation." Income from

40-acre homestead allotment not subject to taxation for years prior to 1921, in view of the Act of June 30, 1902 (32 Stat. 500, 503), which provides that such homestead allotments "shall be and remain nontaxable * * * for twenty-one years." (G. C. M. 2008, VII–1 Cum. Bull. 209.)

1929 Restricted income from restricted land purchased by a noncompetent Otoe Indian with the consent of the Secretary of the Interior is subject to federal income taxation (scope of Attorney General's opinions limited in view of decision in *Shaw v. Gibson-Zahniser Oil Corp.*, 276 U. S. 575). (G. C. M. 6020, VIII–1 Cum. Bull. 63, reversing G. C. M. 2715, VII–1 Cum. Bull. 56.)

1930 Income of minor Creek Indians under guardianship subject to the jurisdiction of the probate courts of Oklahoma is subject to federal income taxes, except as to income from nontaxable homestead allotments as to which the statutory 21-year period has not expired (G. C. M. 8066 IX–2 Cum. Bull. 316).

1931 Restricted income of Choctaw Indians derived from reinvestment by the Interior Department of income from restricted, allotted lands held taxable (G. C. M. 9621, X–2 Cum. Bull. 111).

C. *Current Period* (1936–date)

1936 Procedures with respect to taxability of income of certain Indians from allotted lands reviewed in the light of *Superintendent v. Commissioner*, 295 U. S. 418:

No change in procedures is required with respect to taxation of income from allotted

lands of Five Civilized Tribes. Such income is and has been taxed or considered "exempt from taxation" (see, e. g., 34 Stat. 137, 144) according to the statutory pattern (G. C. M. 16020, XV–1 Cum. Bull. 78).

Hereafter the income of restricted Osage Indians from mineral leases on tribal lands should be taxed inasmuch as the relevant statutes do not confer any tax exemption, and in view of the fact that in *Superintendent* v. *Commissioner*, *supra*, "The Court specifically stated that the decision in *Blackbird* v. *Commissioner* (38 Fed. 2d, 976), which is to the contrary, does not harmonize with its opinion in *Choteau* v. *Burnet* (283 U. S., 691) * * *" (G. C. M. 16100, XV–1 Cum. Bull. 80).[14]

1937 Attorney General ruled (39 Op. A. G. 107) that decision of Supreme Court in *Superintendent* v. *Commissioner*, *supra*, must prevail over the contrary conclusion reached in 34 Op. A. G. 439 (1925) (*supra*) regarding the taxability of income from restricted lands of the Quapaw Indians (1937–2 Cum. Bull. 61).

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[14] This ruling was revoked in 1937, the Bureau considering that it was estopped by the judgment in *Blackbird* v. *Commissioner*, 38 F. 2d 976 (C. A. 10) (a class suit on behalf of the Osage tribe), from asserting income tax liability with respect to royalty income from Osage lands. G. C. M. 18242, 1937–1 Cum. Bull. 57. This latter ruling was promptly used as a basis for criticizing the application of the doctrine of estoppel by judgment to income tax cases (see 51 Harv. L. Rev. 559–560 (1938)), and after this Court clarified the proper application of the doctrine, in *Commissioner* v. *Sunnen*, 333 U. S. 591, the ruling was revoked (G. C. M. 26399, 1950–2 Cum. Bull. 8).

1938 Indian Superintendents informed by Commissioner of Indian Affairs that "Unless * * * there is specific exemption either by treaty or act of Congress, the Indians should file returns as well as other citizens when their income is sufficient to bring them under the terms of the Federal Income Tax Law." Dept. of Interior, Office of Indian Affairs, Misc. Circular 3240, March 11, 1938 (Encl. 2, p. 23, *infra*).

1954 The Internal Revenue Service restated its position "that exemption from the payment of Federal income tax may not be implied, and that if exemption of Indians from the payment of such tax exists, it must derive plainly from the Federal tax statutes, or from treaties or agreements with the Indian Tribes concerned or some Act of Congress dealing with their affairs." (Rev. Rul. 54–456, 1954–2 Cum. Bull. 49).

Land–
Contracts.
R J H

Appendix
Enclosure 1

DEPARTMENT OF THE INTERIOR

OFFICE OF INDIAN AFFAIRS

WASHINGTON

Circular No. 835.

MARCH 7, 1914.

Superintendents in Charge of Indians:

Referring to the recent so-called Income Tax Law, your careful attention is directed to the following correspondence between this Department and the Treasury Department:

DEPARTMENT OF THE INTERIOR

WASHINGTON

FEBRUARY 12, 1914.

The Commissioner
of Internal Revenue:

SIR: Will you please advise this Department at as early a date as practicable whether moneys arising under the acts of Congress cited in the following paragraphs are subject to taxation under Section 2 of the Act of October 3, 1913, entitled "An Act to Reduce Tariff Duties and to Provide Revenue for the Government, and for Other Purposes," and if so, what shall be considered the source at which the tax shall be withheld?

1. Oil and gas royalties paid into the Osage Indian Agency under the Act of March 3, 1905 (33 Stat. L., 1048, 1061), and Sec. 3 of the Act of June 28, 1906 (34 Stat. L. 539, 543). The former Act extended for a period of ten years, from March 16, 1906, as to 680,000 acres, a lease given by the tribe to one Edwin B. Foster for oil and gas mining purposes, which lease was first made on March 16, 1896, under the provisions contained in the Act of February 28, 1891 (26 Stat. L. 794), as amended by the Act of August 15, 1894 (28 Stat. L. 305).

The Act of June 28, 1906, provided for the division of the lands and funds of the Osage Indians, but specifically reserved to the tribe all the minerals under the lands. These royalties when collected constitute a tribal fund, and are deposited in the Treasury as such.

2. Payments of pro rata shares of the Osage tribal fund. The first subdivision of Sec. 4 of the Act of June 28, 1906, supra, provided for the segregation of the Osage tribal fund, and the placing of the same to the credit of the individual members of the tribe on the basis of a pro rata division, the funds to remain in the Treasury, and to draw interest. The Act of April 18, 1912, (37 Stat. L. 86, 87), provided for the payment, under regulations to be prescribed by the Department, to the Osage allottees of the segregated funds. When claims for the segregated shares are allowed, the warrants are prepared by the Treasury and forwarded to the superintendent for delivery.

3. Quarterly payments to individual Osage Indians under the second subdivision of Sec. 4 of the Act of June 28, 1906, supra, which provides for the distribution of all royalties received from tribal mineral leases and from other sources. The shares of minors are, under the law, paid to the parents unless withheld by the Commissioner of Indian Affairs, which he may do if he is satisfied that the funds of any minor are being misused or squandered.

Should these funds be subject to taxation, are the shares of each individual Indian to be considered as separate and distinct incomes, or are the shares of the minors which are paid to the parents to be considered as a part of the parents' income?

4. Damages paid to individual allottees by reason of operations under tribal leases. Sec. 26 of the Regulations of July 3, 1912, a copy of which is inclosed, provides how surface damages

shall be ascertained. Only in cases where there is a controversy are the funds paid through the Agency; otherwise the agreements are direct with the allottees.

5. Rents arising under leases made by individual Osage allottees covering the surface in accordance with Sec. 7 of the Act of June 28, 1906, supra. Under the regulations of the Department now in force, these rents must pass through the hands of the Superintendent in charge of the Osage Agency. Some leases are still in effect under former regulations which permitted the rents to be paid direct to the allottees and to the parents of minors. Are the rents from the minors' allotments to be considered as the income of the minors or part of the income of the parents?

6. Rents and royalties arising under leases of tribal lands in general for agricultural, grazing and mining purposes, under the Act of February 28, 1891, as amended by the Act of August 15, 1894, supra. These funds are paid into the offices of the various Superintendents in charge of Indian reservations and deposited by him in the Treasury where they are carried under the caption, "Indian Moneys, Proceeds of Labor", and are subject to expenditure for the benefit of the several tribes to whose account the moneys are covered in, under the direction of the Secretary of the Interior as provided in the Acts of March 3, 1883 (22 Stat. L., 590), and March 3, 1887 (24 Stat. L., 463).

7. Funds arising from the sale and lease of lands allotted to Indians under the provisions of the Act of February 8, 1887 (24 Stat. L., 388),

and similar Acts. This Act provides that upon the approval of allotments by the Secretary of the Interior, "he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of 25 years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumberance whatsoever."

The law permits the leasing of these allotted lands for farming, grazing and mining purposes under regulations prescribed by the Secretary of the Interior. The various regulations prescribed by the Department require in some cases that the lands and royalties shall be paid into the hands of the Indian Superintendent having jurisdiction over the allotments and in other cases the funds are paid direct to the allottee.

Sales of allotted lands held in trust by the United States may be made under Sec. 7 of the Act of May 27, 1902 (32 Stat. L., 245, 275), the Act of March 1, 1907 (34 Stat., L., 1015, 1018), the Act of May 29, 1908 (35 Stat. L., 444), and Act of June 25, 1910 (36 Stat., L., 855), and under the regulations of the Department the proceeds are paid into the hands of the Superintendent having jurisdiction over the lands.

In connection with the question of taxation of Indian lands and proceeds thereof, your attention is respectfully directed to the case of the United States vs. Rickert (188 U. S. 432) in which it was held (syllabus) "that neither the lands allotted, nor the permanent improvements thereon, nor the personal property obtained from the United States and used by the Indians on the allotted lands, are subject to State or local taxation during the period of the trust," and to the case of the United States vs. Thurston County (143 Federal Reporter 287), in which the United States Circuit Court of Appeals, Eighth Circuit, held that "the lands and their proceeds so long as they are held or controlled by the United States and the term of the trust has not expired * * * are not subject to taxation by any State or county."

Respectfully,

(Signed) A. A. JONES,
First Assistant Secretary.

TREASURY DEPARTMENT
WASHINGTON

FEBRUARY 25, 1914.

The Honorable
The Secretary of the Interior.

SIR: This Department is in receipt of your letter of February 12, asking whether certain funds, the property of Osage Indians, are taxable, and if they are taxable, whether shares and interest therein the property of minors, paid to parents of such minors, are to be considered the income of the parents.

The individual is the taxable entity, and only income (as distinguished from principal) accruing to the individual is taxable.

It appears from your letter that the funds in question consist of (1) rents for the use of land; (2) royalties from oil, gas, and other mineral leases; (3) damages for injury to the surface of the land; (4) proceeds from sale and lease of Indian lands.

It also appears from your letter that (with the exception of damages aforesaid—and they also, in case of controversy—and certain rents paid to individual allottees) all of the aforesaid funds are subject to the receipt, custody, control, and disposition of the Interior Department.

It also appears that upon division of lands and funds of the Osage Indians the minerals under the lands were specifically reserved to the tribe, and that mineral royalties collected constitute a tribal fund and are deposited in the United States Treasury as such, to the credit of the individual members of the tribe, on the basis of a pro rata division, the funds to remain in the Treasury and draw interest; that the individual interests in these funds, together with their accumulation, may be, by statutory provision therefor, paid to the individual Indian entitled thereto, the warrant for such interest being prepared by the Treasury Department and forwarded to the Superintendent of the Indian Agency for delivery; that under the provisions of the law and Department regulations, the shares of minors in the aforesaid funds are paid to the parents of such minors, within the discretion of the Commissioner of Indian Affairs.

As to damages paid to individual allottees: Your regulations, July 3, 1912, Section 26, to which you refer, did not accompany your letter, and it does not otherwise appear what these damages are. If, as a matter of fact, they are reimbursement for depreciation solely, the question is presented whether they exceed actual depreciation. If no depreciation were claimed it might be that damages to the extent of allowable depreciation would not be considered income. Any excess of such damages over actual depreciation allowed would be income. If depreciation were claimed and allowed, the entire amount of damages would be income.

As to the rent paid direct to the allottees, and by law and regulation, the interest of minor Indian children paid to their parents: In both the case of damages and such rent, it appears that the same, as income, is legally received direct by the Indians, and that the United States Government has no enforcible interest therein and no right of custody, control, or disposition thereof. As to this particular income, so far as at present advised, this Department holds the Indian receiving it will be held responsible for any tax which may be due and payable thereon, and that when the amount of such income as shall be taxable, added to other income received, shall amount to $3,000 per year ($2,500 March 1 to December 31, 1913) a return of income will be required. In this connection also, the income belonging legally to minor children but legally paid to parents of such children, is to be accounted for as income of parents.

3. Whether the Interior Department—through its officer at Muskogee—is the "source" for the purpose of withholding income tax payable from salaries accruing to tribal attorneys and officers, and which said salaries are payable from Creek tribal funds?

1. Upon consideration of facts set out in your letter, this Office holds the royalties in question are within the classes of income which are subject to the provisions of the income tax law.

2. The "source" is "the place where the income originates." It appears from your letter that the grantors in the leases, the subject of your letter, are individual members of the Five Civilized Tribes, and the inference follows that the lessees are individuals or corporations capable of independent contract. It does not appear from your letter what is the legal relationship subsisting between the Union Agency (or its Superintendent) and the aforesaid grantors in matter of these leases. It would seem from your letter, however, that the Union Agency is the representative of the Interior Department in dealing with these Indian interests. If, as a fact, the relationship between the Interior Department and the aforesaid grantors in his behalf is that of a fiduciary, the said Union Agency, as the agent of the Interior Department, may be considered as the "source." The Interior Department assuming the duty of withholding through its Union Agency, aforesaid, acquittance may be given the lessees in accordance with income tax form 1015, and the Union Agency having in possession, with diminution, the aforesaid royalties, will then withhold and pay over to the Collector

of Internal Revenue, in accordance with income tax provisions, the amount of income tax accruing upon taxable funds in its hands. It would seem to follow that, as the administrative agency of the aforesaid Indian interests, the Superintendent of the Union Agency may be directed to ascertain and make the allowable deduction for depreciation of mines, etc.

3. If, as a fact, the Interior Department has the custody, control, and disposal of the funds from which the salaries of tribal attorneys and officers in question are paid, it will be considered the "source" and should direct its officers accordingly.

Copy of form 1015 is herewith enclosed, as exhibit, for your information.

Trusting that matters of law and regulation, the subject of inquiry, have been accurately and satisfactorily covered, I am,

Respectfully,

(Signed) C. S. HAMLIN,
Acting Secretary.

You will govern yourself in accordance herewith.

Respectfully,

E. B. MERITT,
Assistant Commissioner.

3-HFW-5

UNITED STATES DEPARTMENT OF THE INTERIOR

OFFICE OF INDIAN AFFAIRS

WASHINGTON

Misc. /

Appendix
Enclosure 2

Circular No. 3240

Liability of Restricted Indians to Federal Income Tax.

MARCH 11, 1938.

To all Superintendents:

Numerous inquiries have been received regarding the liability of restricted Indians to Federal income tax.

The Supreme Court of the United States in the case of *Superintendent of Five Civilized Tribes* v. *Commissioner of Internal Revenue* (295 U. S. 418), held that the income of Indians is subject to the Federal income tax unless specifically exempted by treaty or act of Congress.

Unless, therefore, there is specific exemption either by treaty or act of Congress, the Indians should file returns as well as other citizens when their income is sufficient to bring them under the terms of the Federal Income Tax Law.

(SGD) JOHN COLLIER,
Commissioner.

U. S. GOVERNMENT PRINTING OFFICE, 1938

Office - Supreme Court, U. S.
JUL 13 1955
HAROLD B. WILLEY, Clerk

No. 134

IN THE

Supreme Court of the United States

October Term, 1955

CLARK SQUIRE, Collector of Internal Revenue for the District of Washington, *Petitioner*

v.

HORTON CAPOEMAN and EMMA CAPOEMAN, his wife

BRIEF IN OPPOSITION

To the Petition for Writ of Certorari

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IN THE

Supreme Court of the United States

October Term, 1955

No. 134

CLARK SQUIRE, Collector of Internal Revenue for the District of Washington, *Petitioner*

v.

HORTON CAPOEMAN and EMMA CAPOEMAN, his wife

BRIEF IN OPPOSITION

To the Petition for Writ of Certorari

TREATIES AND STATUTES INVOLVED

Treaty provisions and statutes involved are quoted in the appendix to the petition save those provisions of Art. I of the Treaty with the Quinaielt of July 1, 1855, and January 25, 1856, 12 Stat. 971, which disclose the Quinaielt habitat, the entire article reading as follows:

> ARTICLE I. The said tribes and bands hereby cede, relinquish, and convey to the United States all their right, title, and interest in and to the lands and country occupied by them, bounded and de-

scribed as follows: Commencing at a point on the Pacific coast, which is the southwest corner of the lands lately ceded by the Makah tribe of Indians to the United States, and running easterly with and along the southern boundary of the said Makah tribe to the middle of the coast range of mountains; thence southerly with said range of mountains to their intersection with the dividing ridge between the Chehalis and Quiniatl Rivers; thence westerly with said ridge to the Pacific coast; thence northerly along said coast to the place of beginning.

QUESTIONS PRESENTED

1. Is allotted land on the Quinaielt Indian Reservation, which has never been transferred free of restriction to the Indian allottee, subject to capital-gains tax upon its conversion by the United States into cash, notwithstanding the undertaking by the United States to transfer the land to him "free of all charge or incumbrance whatsoever"?

2. Is there a "basis" for capital-gain tax on the sale of timber growing on restricted, allotted Indian land held by the United States in trust and never, prior to the sale of the timber, transferred to the allottee without restriction, which basis is other or different than the proceeds realized by the United States to be held for the allottee?[1]

[1] The question of there being no capital asset, hence no basis, until the land (or the proceeds of its conversion) be transferred to the allottee free of all charge or incumbrance whatsoever was a ground of the decision of the District Court (see p. 11a of the petition). It was not expressly adverted to by the Court of Appeals. Even were it ruled against respondent in the Court of Appeals it would be open upon review of the merits in this Court, since its resolution in accordance with respondents' theory would support the judgment of the court below. *Langnes v. Green*, 282 U.S. 531, 538-9.

STATEMENT

When white men came to the Olympic Peninsula, they found the Quinaielt Tribe and their neighbors, the Quillehute, occupying a tract of country lying between the Coast Range and the ocean. This land (save for the reservation of certain lands for their exclusive use, Art. II), they ceded just a century ago to the United States by Treaty of July 1, 1855, and January 25, 1856, 12 Stat. 971, Art. I. It is on the reservation set up pursuant to this treaty that respondents—full blood Quinaielt Indians—live. R. 33, 34-35.

In the treaty it had been understood that the Quinaielts should have exclusive use of their reservation "and no white man shall be permitted to reside thereon without permission of the Tribe" (Art. II). But a new approach to the "Indian problem" resulted in the enactment of the General Allotment Act of 1887, c. 119, 24 Stat. 388, 25 U.S.C. § 331, *et seq.* Thereunder, Indians were to be allotted lands on their reservations not to exceed 160 acres of grazing land or 80 acres of agricultural land; and 25 years after allotment the allottees were to receive the lands discharged of the trust under which the United States had theretofore held them and to take a patent "in fee discharged of said trust and free of all charge or incumbrance whatsoever" (25 U.S.C. § 348)—though the President might extend the period. Still further change of policy with respect to the Indian problem (in 1934) has decreed that existing periods of trust or restriction on alienation are extended until otherwise directed by Congress. 25 U.S.C. § 462.

Under the General Allotment Act of 1887 petitioner was allotted 93.25 acres and received a trust patent

October 1, 1907 (R. 13, 35). The patent represents (R. 14) that the United States

> "does and will hold the land thus allotted (subject to all statutory provisions and restrictions) for the period of twenty-five years, in trust for the sole use and benefit of the said Indian, and that at the expiration of said period the United States will convey the same by patent to said Indian, in fee, discharged of said trust and free of all charge or incumbrance whatsoever, if the said Indian does not die before the expiration of the trust period; but in the event said Indian does die before the expiration of that period this patent and the allotment upon which it is based shall be canceled, and the said land shall revert to the United States and be thereafter disposed of in the manner prescribed by law."

The title continues to be held in trust (R. 35).

In 1943 standing timber on respondent Indian's allotment was cut, sold and paid for pursuant to a contract by the Bureau of Indian Affairs with the approval of respondents, the sales price being in the amount of $8,418.28 (R. 36). From this, $2,026.80—being the fair market value of the timber March 31, 1913, as determined by the forest ranger at Talolah Indian Agency (R. 20)—was deducted; together with $673.46 expenses of sale (R. 18), leaving a "gain" of $5,718.64, of which 50%, or $2,859.32, was taken into account (R. 18, 15-16) as a long-term capital gain in computing respondents' income tax for 1943. The tax computed on this theory was paid from the trust-fund proceeds in the hands of the Indian agency (R. 19-20) and respondent sued upon a timely claim for refund. (R. 20-22).

Judge Fee (110 F. Supp. 924, Appendix B to the petition herein, p. 8a) held respondents entitled to

recover. The United States having taken this property with the obligation to convey it at the end of the trust period to the allottee in fee "discharged of said trust and free of all charge or incumbrance whatsoever", it follows that until the allottee is put in possession of the land on those terms—namely, the whole corpus of the trust, which it has been agreed will be turned over to him free of all charge or incumbrance—the land cannot be treated as an ordinary "capital asset" for tax purposes. He pointed out that immediately on turning over to an Indian a patent in fee, the Indian receives a value greater than the March 1, 1913, value or the value on the date of the treaty; but if, thereupon, the Federal government taxed that increment, it would destroy the value of the trust property and violate its undertaking. Timber is a part of the land, and the proceeds of timber here are a substitute for the land itself. Merely by cutting the timber, the trustee does not relieve itself of the trust, or become entitled to help itself to proceeds of that which it had promised to put in the hands of respondents.

The Court of Appeals for the Ninth Circuit (Healy, Bone and Chambers, JJ.) affirmed *per curiam*, noting general agreement with Judge Fee and noting also that "this attempt to tax evidences, at the least, a sorry breach of faith with the Indians." It found no ground for the distinction which Judge Fee had supposed of the decision of the Tenth Circuit in *Jones v. Tannah*, 186 F. 2d 445, but expressly agreed with the dissenting opinion of Chief Judge Phillips in that case. 220 F. 2d 349. Petn. p. 13a.

ARGUMENT

1. There is no conflict with *Jones* v. *Taunah* (C.A. 10th, 1951), 186 F. 2d 445, cert. den. 341 U.S. 904. For the present case involves a so-called capital-gains tax, and the question whether there can be any "gain" where the undiminished, unincumbered corpus itself must be put in the hands of the government's ward. There is no "basis" in cost to the ward which is other or different than the proceeds of the sale of land (standing timber) involved here. But in the *Taunah* case no capital-gains situation was involved, but oil bonuses and royalties—which have never as to annual product been treated as involving capital gains at all, but carry their own formula for depletion, and thus in theory restore the basic capital itself at current values, as distinguished from the annual product of the land. In Taunah's case the government complied with its obligation to turn over to him either the land or the proceeds of the conversion of the land; this it did through the depletion allowance. But in the present case the tax collector has helped himself not to the mere annual product of the land, such as the annual growth of timber for the year of sale, but to a portion of the proceeds of sale which stand in place of the land itself.

This Court itself has marked the clear distinction between situations such as *Taunah*—in which the taxpayer gets back his capital at current rates through the depletion allowance—and the sale of a capital asset. Said this Court in *Anderson* v. *Helvering*, 310 U.S. 404, 407-8:

> * * * The production of oil and gas, like the mining of ore, is treated as an income-producing operation, not as a conversion of capital invest-

ment as upon a sale, and is said to resemble a manufacturing business carried on by the use of the soil. *Burnet* v. *Harmel*, 287 U.S. 103, 106-107; *Bankers Coal Co.* v. *Burnet*, 287 U.S. 308; *United States* v. *Biwabik Mining Co.*, 247 U.S. 116; *Von Baumbach* v. *Sargent Land Co.*, 242 U.S. 503, 521, 522; *Stratton's Independence* v. *Howbert*, 231 U.S. 399, 414. The depletion effected by production is likened to the depreciation of machinery or the using up of raw materials in manufacturing. *United States* v. *Ludey*, 274 U.S. 295, 302-303; *Lynch* v. *Alworth-Stephens Co.*, 267 U.S. 364, 370. Compare *Von Baumbach* v. *Sargent Land Co.*, supra, at 524-525. The deduction is therefore permitted as an act of grace and is intended as compensation for the capital assets consumed in the production of income through the severance of the minerals. *Helvering* v. *Bankline Oil Co.*, 303 U.S. 362, 366-367. The granting of an arbitrary deduction in the interests of convenience, of a percentage of the gross income derived from the severance of oil and gas, merely emphasizes the underlying theory of the allowance as a tax-free return of the capital consumed in the production of gross income through severance. *Helvering* v. *Twin Bell Oil Syndicate*, 293 U.S. 312, 321; *United States* v. *Dakota-Montana Oil Co.*, 288 U.S. 459, 467."

See also *Helvering* v. *Elbe Oil Land Co.*, 303 U.S. 372, 375; *Badger Oil Co.* v. *Commissioner Int. Rev.*, (C.A. 5th, 1941), 118 F. 2d 791, 793.[2]

[2] In this last-cited case the Court of Appeals for the Fifth Circuit stated, with the citation of many authorities:

"* * * The allowance for depletion is intended to return to the owners of the oil reserve the loss of their capital which enters into the sale price of the oil produced. It deals with income realized by production. It has no application to sales in whole or in part of the capital investment, the oil reserve itself. * * *"

Nor should there be undue apprehension that the express note of conflict below will cause difficulty; for the court below also expressly agreed in the main with the opinion of Judge Fee, which discloses the distinction we have just delineated;[3] and the preference of the court below for the dissenting opinion of Chief Judge Phillips will not be of certiorari importance until and unless that time comes when in a depletion situation the Ninth Circuit court should follow the inclination here expressed.

The assertion of "conflict" with *Scott* v. *Commissioner*, 8 T.C. 126, ignores the fact that cases like that, and this, involving incompetent Indians on the Quinaielt Reservation, would be finally disposed of in the Ninth Circuit Court of Appeals. The *Scott* case was never appealed; and the present case represents the latest expression of the Ninth Circuit Court of Appeals on the subject.

2. It is asserted that the decision below is erroneous, petitioner citing four cases none of which involves conversion by the trustee of the land which it has agreed to deliver free from charge or encumbrance coupled with a levy on the proceeds which should stand in lieu of the land. While *Superintendent of Five Civilized Tribes* v. *Commissioner*, 295 U.S. 418,[4]

[3] "Judge Fee held (Petn., p. 11a), '. . . After the conveyance [of the land to the allottees free of trust], which must be authorized by the Indian in order to burden him with the weight of obligation, the national and state governments are empowered to tax this land and its increments as the real property of any other citizen. It follows that, until the land is thus conveyed, it cannot be treated as 'capital' or a 'capital asset'."

[4] "Income not from the restricted allotment but from investments made, in turn, from funds in excess of taxpayer's needs though originally derived from the allotment.

Choteau v. Burnet, 283 U.S. 691,[4] and the *Oklahoma Tax Commission* cases (326 U.S. 342, 353,[5] footnote 21, and 319 U.S. 598[6]) do indeed dissipate the popularly-held fallacy that Indians are not taxable and pay no taxes, none of them intimates that the United States will not honor its trust through holding either the land or its proceeds at current rates for delivery, intact and without incumbrance, to its ward.

It may be misleading to talk about this case as one of "implied tax exemptions", or to confuse it, as petitioner does, with taxability of annual fruits of the land. Indians are not exempt from tax on their income. When these petitioners are placed in possession of their land or its proceeds, free from the trust, they will then have a "basis" looking to the production of income over that basis in the future. Thereafter they may have capital-gain income, hence be taxed. But so far as this land is concerned (unlike non-restricted or non-trust lands which an Indian or anyone else might purchase) respondents have not yet received their capital upon which to make a gain.

3. The talk of continuing importance of this case in the light of an estimated 13,600,000 acres of restricted, allotted lands from which the income is substantial would not apply to respondents' case or to respondents' income or that of other Indians situated as are respondents. If that importance warrants review, then such a case, just decided, as *Nicodemus v. United*

[4] Income actually received by a *competent* Indian stemming from oil-and-gas leases.

[5] State gross-production tax on *lessees*, not Indians, even the dictum cited referring only to oil royalty income.

[6] State inheritance tax.

States (N. Div. Ida., June 15, 1955), 1955 P-H Tax Service, ¶ 72,786, involving ordinary income from trust or restricted land in the form of rents and grain (*fructus industriales*) would be a more likely target of a petition. Oil and gas bonuses, rents and royalties from leases are not in point, as we showed above. And any great proceeds from sales of land in the guise of standing timber of Indian allottees must be substantially confined to the Olympic Peninsula, hence to the Ninth Circuit—but in any event, even were that not so, should await the occasion of a conflict, if ever one arises.

CONCLUSION

There is no conflict of decisions among the circuits and there is no continuing importance in the case sufficient to warrant granting the writ, which accordingly should be denied.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. 134

CLARK SQUIRE, Collector of Internal Revenue for the District of Washington,

Petitioner,

vs.

HORTON CAPOEMAN and EMMA CAPOEMAN, His Wife

BRIEF FOR RESPONDENTS

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1. Is allotted land on the Quinaielt Indian Reservation which was never transferred free of restriction to the Indian allottee, subject to capital-gains tax upon its conversion by the United States into cash, notwithstanding the trust assumed by the United States to transfer the land to him "free of all charge or incumbrance whatsoever"?

2. Is there a "basis" for capital gain tax on the sale of timber growing on restricted, allotted Indian land held by the United States in trust and never, prior to the sale of the timber, transferred to the allottee, outright in accordance with the Congressional scheme, which basis is other or dif-

ferent than the proceeds realized by the United States to be held for the allottee?[1]

Statement

When white men came to the Olympic Peninsula, they found the Quinaielt Tribe and their neighbors, the Quillieute, occupying a tract of country lying between the Coast Range and the Pacific ocean. This land (save for the reservation of certain lands for their exclusive use, Art. II), the Quinaielts and Quillicutes ceded just a century ago to the United States by Treaty of July 1, 1855, and January 25, 1856, 12 Stat. 971, Art. I. It is on the reservation set up pursuant to this treaty that respondents, fullblood Quinaielt Indians, live. R. 33, 34-35.

In the treaty it had been understood that the Quinaielts should have exclusive use of their reservation "and no white man shall be permitted to reside theron without permission of the tribe" (Art. II). But a new approach to the "Indian problem" resulted in the enactment of the General Allotment Act of 1887, c. 119, 24 Stat. 388, 25 U.S.C. § 331, *et seq.* Thereunder, Indians were to be allotted lands on their reservations not to exceed 160 acres of grazing land or 80 acres of agricultural land; and 25 years after allotment the allottees were to receive the lands discharged of the trust under which the United States had theretofore held them and to take a patent "in fee discharged of said trust and free of all charge or incum-

[1] The question of there being no capital asset, hence no basis, until the land (or the proceeds of its conversion) be transferred to the allottee free of all charge or incumbrance whatsoever was a ground of the decision of the District Court (R. 56-57). It was not expressly adverted to by the Court of Appeals. Even were it ruled against respondent in the Court of Appeals it would be open upon review of the merits in this Court, since its resolution in accordance with respondents' theory would support the judgment of the court below. *Langnes* v. *Green*, 282 U.S. 531, 538-9.

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Under the General Allotment Act of 1887 petitioner was allotted from the treaty-guaranteed reservation 93.35 acres and received a trust patent October 1, 1907 (R. 13, 35). The patent represents (R. 14) that the United States

> "does and will hold the land thus allotted (subject to all statutory provisions and restrictions) for the period of twenty-five years, in trust for the sole use and benefit of the said Indian, and that at the expiration of said period the United States will convey the same by patent to said Indian, in fee, discharged of said trust and free of all charge or incumbrance whatsoever, if the said Indian does not die before the expiration of the trust period; but in the event said Indian does die before the expiration of that period this patent and the allotment upon which it is based shall be canceled, and the said land shall revert to the United States and be thereafter disposed of in the manner prescribed by law."

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Summary of Argument

1. This case involves no question of the ordinary annual product, such as agricultural crops, of an Indian's land or labor, but the capital value itself of an allotment of tribal land. Congress has said that the allottee is ultimately to get that land "in fee, discharged of said trust and free of all charge or incumbrance whatsoever"; that only thereafter shall the land be subject to "sale, incumbrance, or taxation"; and that in no event shall the land become liable to the satisfaction of "any debt" (federal income taxes are debts) contracted prior to the patent in fee. The land thus to be received includes the timber. Diminution in value is "incumbrance" of the land: and for the government to help itself to the proceeds of the land (timber) is clearly "incumbrance".

Congress has deliberately adopted a policy of protection of the allotment during the apprenticeship of restricted, reservation Indians. To permit petitioner to take a substantial part of the capital value of the land under the guise of taxes is inconsistent with that plain policy of Congress to preserve it intact. It is conceded by petitioner that the Congressional policy flatly forbids real-estate taxes under state authority. Would the Congressional policy which strained at the gnat of the local real-estate tax readily swallow the cannonball of the federal income tax, where both are paid at the expense of the very property?

The only value of these lands is in the forest product; and the subversion of the Congressional policy that respondent should have the lands without diminution is glaring in the light of the value of the land with and without the forest on it. These restrictions on incumbrance, including dissipation of the land through taxes, are a prop-

erty right; the terms are part not merely of the statute but of the so-called "trust patent" issued pursuant to the statute. If they have been repealed *pro tanto* as to the federal income tax, that is so because the income-tax statutes are construed as an implied repeal. This will not be the construction because repeals by implication are not favored; repeal would raise a serious constitutional question of the taking of respondent's property right without just compensation; and there is no clear and manifest intention of the legislature to repeal since it has affirmatively recognized the need for continuance of the restrictions. The Congressional policy in the allotment acts is a political question, which petitioner should not ask this Court to revise. Here the government is sharing in the capital itself —an invasion of the trust *res* which merely masquerades as a tax.

2. Respondent husband was not engaged in the "cutting and sale of timber, an ordinary income-producing operation", as petitioner asserts. That is logging. No part of the proceeds of the timber represented the labor or enterprise of respondents; there was simple substitution of the cash asset for the timber, both held by the government. The only connection this allottee had with what was done with his timber was to consent to its sale. In that capital transaction, the sale, respondent allottee has not even yet "acquired" his land, or its substitute, the proceeds. Until he receives that capital without charge or incumbrance, he has never yet "acquired" the land so as to be subject at all to the capital-gain provision. The provisions permitting a taxpayer to elect to apply depletion principles to timber which he purchases are inapplicable because respondents did not engage in the logging business, those depletion provisions are no better designed than are the capital-gain provisions to carry out the Congressional purpose to place respondents in possession of the undiminished capital

value of their land, and in any event the capital-gains treatment constituted an election that is binding on petitioner as well as these respondents.

Petitioner's argument that "these Indians are not entitled to any better treatment than is accorded to other taxpayers who own timber lands and who are taxed with income as it is realized" bespeaks a prejudice on the so-called "Indian problem". That problem is far more complicated than the casual or uninformed person, who follows the same line of thought, might suppose. Though petitioner, and even this Court, might not agree with the Congressional policy of handling that problem, the Congressional policy with respect to these non-competent, full-blood, reservation Indians must control.

ARGUMENT

I. This Is Not a Question of Tax Exemption, But Whether a Specific Trust Assumed by the United States Shall Be Avoided by Cloaking Its Invasion as a "Tax".

We are not dealing here with the ordinary annual product, such as agricultural crops, of an Indian's land or labor. With respect, for instance, to the annual products of a restricted or trust allotment, a noncompetent Indian may be either taxable[2] or non-taxable,[3] a question which

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[2] Garry *v.* Commissioner Int. Rev. (1955), 24 T.C. No. 23 (rentals of restricted allotments).

Jones *v.* Taunah (C.A. 10, 1951), 186 F. 2d 445, cert. den. 341 U.S. 904, No. 568 O.T. 1950 (agricultural-lease income, all judges concurring; oil-royalty income, one judge dissenting).

[3] Nicodemus v. United States (D.C. Id., 1955), 132 F. Supp. 608 (proceeds of grain).

United States *v.* Homeratha (W.D. Okla., 1930), 40 F.2d 305, app. dis. 49 F.2d 1086 ("rents, profits and mineral, especially oil and gas").

Pitman *v.* Commissioner Int. Rev. (C.A. 10, 1933), 64 F.2d 740 (oil bonus and royalties as to "homestead" lands of a member of the Five Civilized Tribes).

need not be resolved here because not presented on this record, there being in this case no such annual income to be concerned with.[4]

Whatever might be the case with respect to annual income from a trust allotment, we are concerned here with the land itself. The land marked out to be allotted to respondent husband was never freed from the trust restrictions under which it was segregated from the tribal holdings. (R. 35.) He has never yet received the land in fee, without diminution or encumbrance. The stand of timber here involved could not be realized by the allottee as can annual products of the land. (R. 35-6, § VII) And yet the United States has said that he is first to get that land before he may encumber it in any way; that at the expiration of the trust period he shall have a patent to the land (25 U. S. C. § 348, Petr. Brf. p. 41)—

> "in fee, discharged of said trust and free of all charge or incumbrance whatsoever."

And the land thus to be received includes the timber; "The timber while standing is a part of the realty, and it can only be sold as the land could be. The land cannot be sold by the Indians; and consequently the timber, until rightfully severed, cannot be." *United States v. Cook*, 19 Wall. 591, 593. Cf. *Northern Pac. R. Co. v. Paine*, 119 U.S. 561, 564; *Starr v. Campbell*, 208 U.S. 527, 534. The

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[4] The two cases repetitively relied upon by petitioner are not even as nearly related to the present case as are those in notes 2 and 3. One (Choteau *v.* Burnet, 283 U.S. 691) involves a competent Indian, hence does not involve restricted or "trust patent" lands at all. The other (Superintendent Five Civ. Tr. *v.* Commissioner Int. Rev., 295 U.S. 418) involves ordinary investment income, the only connection with trust-patent land being that originally the source of the funds to be invested had been the product of the land.

statute expressly says that only *after* the patent in fee is issued will the land (timber) be subject to "sale, incumbrance, or taxation."[5] 25 U.S.C. § 349 (quoted Petr. Brf. p. 43). The statute says twice that allotted land "shall not be liable to the satisfaction of any debt contracted prior to the issuing of such patent" (25 U.S.C. § 349; quoted, Petr. Brf. p. 43) and that no such lands "shall, in any event, become liable to the satisfaction of any debt contracted prior to the issuing of the final patent in fee therefor" (Act of June 21, 1906, c. 3504, 34 Stat. 325, 327; 25 U.S.C. § 354, not quoted by petitioner but set forth in the note[6]). Yet federal income taxes are debts. *Price* v.

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[5] Petitioner discusses this latter statute in a footnote at p. 13 of his brief, dismissing it with the agreeable supposition that it merely made clear that Indian lands transferred in fee to the Indians would thereafter be subject to state and local taxation, federal direct taxation of lands being unknown in 1906 (when the statute was adopted) because of the apportionment requirement of the Constitution. Petitioner wholly overlooks that this statute speaks not merely of taxation, but equally of the more-inclusive term "incumbrance"—with respect to which the text above immediately proceeds. More important, petitioner misapprehends the policy or purpose of the provision of the allotment acts, as to which see the text, below. Congress had no purpose to insure that the states affirmatively *tax* Indians (which some state constitutions forbade; cf. United States *v.* Rickert, 188 U.S. 432, 441) but Congress was concerned with a policy of protection of the Indians until competency be established.

[6] The Indian Department Appropriation Act for 1907, Act of June 21, 1906, c. 3504, 34 Stat. 325, 327, provided in part:

> "That the Act entitled 'An Act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes,' approved February eighth, eighteen hundred and eighty-seven, be, and is hereby, amended by adding the following:
>
> "No lands acquired under the provisions of this Act shall, in any event, become liable to the satisfaction of any debt

United States, 269 U.S. 492, 499; *Massachusetts* v. *United States*, 333 U.S. 611, 625, and cases cited n. 24.

Finally, the statute says that when the restrictions are removed, then the allottee shall have the land (timber) "in fee, discharged of said trust and free of all charge or incumbrance whatsoever." 25 U.S.C. 348 (quoted in Petr. Brf. p. 41).

The ordinary content given the word "incumbrance" includes a diminution in value. *Miller* v. *Schwinn* (C.A.D.C., 1940), 113 F. 2d 748, 751; *Westerlund* v. *Black Bear Min. Co.* (C.A. 8, 1913), 203 Fed. 599, 605-6. When the United States sells the timber, the land, of the Indian ward and helps itself for "taxes" to the capital proceeds of land which it has never turned over in the first place there has, indeed, been "diminution in value." To that extent the title has been "incumbered."

Why has Congress adopted such a policy in the allotment acts; what purpose did Congress mean to achieve in the restrictions on sale, incumbrance, and taxation? This Court has said the purpose was "to prepare the Indians to take their place as independent, qualified members of the modern body politic" (*Board of Comrs.* v. *Seber*, 318 U.S. 705, 715); that the purpose of the law is to protect the Indian interest (*Sage* v. *Hampe*, 235 U.S. 99, 105); and that "The purpose of the restrictions was to give the needed protection, and they should be construed in keeping with that purpose" (*Smith* v. *McCullough*, 270 U.S. 456, 464-5). As to taxation, "while relating to the welfare of the Indians, the maintenance of the limitations which

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contracted prior to the issuing of the final patent in fee therefor.

"That no money accruing from any lease or sale of lands held in trust by the United States for any Indian shall become liable for the payment of any debt of, or claim against, such Indian contracted or arising during such trust period, or, in case of a minor, during his minority, except with the approval and consent of the Secretary of the Interior. * * *".

Congress has prescribed as a part of its plan of distribution is distinctly an interest of the United States." (*Heckman v. United States*, 224 U.S. 413, 437). "To lessen the difficulty of the period of transition and to protect the allottees' interest in their lands, Congress by the device of the trust patent or a restricted fee denied them the power to alienate or encumber their lands for fixed periods of time, subject to extension—denials which were sustained as proper exercises of Congressional power" (*Board of Comrs. v. Seber*, 318 U.S. 705, 715). Apparently petitioner would let you believe that the principle of the statute is merely a facet of the instrumentality doctrine. Petr. Brf. p. 15, quoting *United States* v. *Rickert*, 188 U.S. 432, 437. But this Court has found more even as to that decision: "But the decision [in the *Rickert* case] rested upon a broader foundation than the mere holding of a legal title to land in trust, and embraced the recognition of the interest of the United States in securing immunity to the Indians from taxation conflicting with the measures it had adopted for their protection." *Heckman* v. *United States*, 224 U.S. 413, 440-1.

Now if there shall control the purpose which this Court has repeatedly discerned, how would the tax here fit that Congressional purpose? Would respondent husband, who was to receive, when his competency is established, a patent in fee and thereupon get his inheritance, be better protected in assuring that he gets all of that inheritance intact than by permitting the United States to take under the guise of taxes a substantial part of that capital asset with which he would otherwise have been launched? Would the Congressional policy which strained at the gnat of the local real-estate tax readily swallow the cannonball of the federal income-tax, where both are paid at the expense of the very property?

To be borne in mind, too, is the legal status of these re-

strictions on encumbrance incorporated as they are not only in the statute but also in the so-called "patent".[7] For the right of exemption is a property right; it is protected by the Constitution. *Choate* v. *Trapp*, 224 U.S. 665, 673-4; *Carpenter* v. *Shaw*, 280 U.S. 363, 367.[8] The general rule refusing to presume tax exemptions and construing them strictly has no place in construing these statutes. *Carpenter* v. *Shaw*, 280 U.S. 363, 366; *Choate* v. *Trapp*, 224 U.S. 665, 675. The restrictions constitute "an express trust for a valuable consideration to the faithful performance of which the United States was legally committed." *United States*

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[7] This Court has characterized the "patent", as a term for what was issued here, as being inept, and some later cases have referred to it instead as a certificate of allotment. "The word 'patents,' where it is first used in this section, was not happily chosen to express the thought which, it is clear, all parts of the section being considered, Congress intended to express." United States v. Rickert, 188 U.S. 432, 436. "Congress . . . was careful to avoid investing the allottee with the title in the first instance, and directed that there should be issued to him what is inaptly termed a patent . . . but is in reality an allotment certificate. . . ." Monson v. Simonson, 231 U.S. 341, 345. This initial "trust patent", as it is frequently called (COHEN, *Handbook of Fed. Ind. Law*, p. 109), is entirely distinct from the fee patent which it promises.

[8] When we speak here of the right vested in the individual Indian respecting the status of his land as being beyond impairment or invasion in the sense of alienation encumbrance, taxation, etc., we do not overlook the cases holding that there is no such right vested in him as will defeat further action by Congress in discharge of its guardianship. Thus, the trust period in allotments may be extended, Tiger v. Western Investment Co., 221 U.S. 286, 309-316; Heckman v. United States, 224 U.S. 413, 428, and "until final patent be issued no vested right is obtained by the Indian which would support a constitutional objection to the enlargement of the period of the restriction." United States v. Jackson, 280 U.S. 183, 191. Likewise, the trust period may be reimposed on allotments theretofore freed of the trust. Brader v. James, 246 U.S. 88, 96. *Cf.* McCurdy v. United States, 246 U.S. 263, 273.

v. *Ferry County, Wash.* (E. D. Wash., 1938), 24 F. Supp. 399, 400. And indeed it is an express trust; both the statute (25 U.S.C. §348, quoted Petr. Brf. p. 41) and the patent itself (R. 14) declare "that the United States does and will hold the land thus allotted . . . in trust for the sole use and benefit of the . . . [allottee and his heirs] and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever." . . .

Whether the conversion of this undelivered birthright and its dissipation in income taxes is a relatively large or small portion of the whole should, we recognize, make no difference in principle; we do not argue legitimacy on the basis of the size of the baby. Still, the subversion of the Congressional policy becomes gross and glaring when we see the relationship of the value of the timber to the value of the land minus the timber. This Court was apparently startled at the fact in *Starr* v. *Campbell*, 208 U.S. 527, 534, that $15,000 of timber had been removed from an Indian allotment in Wisconsin—and that there remained cut-over land worth only $1,000, so that if the timber were not included in the restraint on alienation it "would be reduced to small consequence if it be confined to one-sixteenth of the value of the land." So in the present case. We are dealing with lands on the western slope of the Olympic Peninsula, where the only value of the land is its forest product.[9]

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[9] It was alleged in this case (R. 9) that the lands involved were heavily timbered, that the principal value was in the timber growing on them, and that the cost of reducing the lands to an arable condition fit for grazing or crop production is prohibitive—which allegations in the main are admitted in the answer (R. 31). It is notorious historical and ecologic fact in this area anyway:

> "Many operators thought they were not only making lumber but liberating the land from the trees, making room for

To the extent the United States fails to set up respondent husband with all his capital intact, and in this case the most important part of his capital, from which point he can go forward with a chance of economic survival in competition with others, to that extent the United States has violated its trust. Petitioner would have you understand that in some way the income-tax statutes scorned this trust—not by forthright repeal of the restrictions, but perhaps through some implication. But repeals by implication are not favored; and the intention of the legislature to repeal must be clear and manifest. *Rosenberg* v. *United States*, 346 U.S. 273, 294-5. A tax-exemption statute itself is subject to this limitation on repeal by mere implication.

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farmers. They advertised the cut-over areas for sale as farm land, and they found takers, for the price was low and the dream of a bit of land of one's own was almost universal. They were called stump ranchers, these hopeful people who came from everywhere to farm this new-won land. They grubbed at the great roots; they fought the encroaching salal and alder and huckleberry and the spikey, insinuating, indestructible blackberry vines. They raised a few crops and gave up, nearly all of them, though many wasted as much as a lifetime trying to grow truck and grain on land that, it finally became clear, was meant to grow only trees." MORGAN, *The Last Wilderness*, p. 131 (1955; Viking.)

"Similarly, ". . . professional foresters say that four out of five acres of forest land in western Oregon and Washington are fit to grow trees and nothing else. This fact did not become known suddenly, as if by revelation. It was recognized slowly, and only after more than half a century of attempts to prove otherwise . . . The unsuitability of the soil for crops was only one reason. What drove a majority of them from their hard-won acres was the appalling energy and power of the reviving forest: the second growth. . . . The forest's surge was so savage as to amaze a stump rancher over and over again, and so persistent as at last to discourage him. One day he reflected there *must* be an easier way to make a subsistence living, and he went away for good." HOLBROOK, *Far Corner*, pp. 239-240 (1952; Macmillan).

Posadas v. *National City Bank*, 296 U.S. 497, 503-6. How much more must it be true that there is no repeal by implication, that there is no repudiation of the Government's trust, when to construe the statute as implying such a repeal or repudiation would raise the serious constitutional question of a taking of the property right (*Choate* v. *Trapp*, 224 U.S. 665, 673-4; *Carpenter* v. *Shaw*, 280 U.S. 363, 367) of respondent husband without just compensation, contrary to the 5th Amendment.

Instead of repealing or watering down, Congress has affirmatively continued the trust period—it has recognized the necessity for continuance of the restrictions. 25 U.S.C. § 462 (quoted Petr. Brf. p. 45). So has the Executive annually to date as to reservations where that automatic statutory continuance of the trust did not apply. 25 C.F.R. c. 1, App.

Petitioner should not expect the courts to review and revise this Congressional policy. Long ago, this Court noted respecting the tax exemption of Indian lands (*United States* v. *Rickert*, 188 U.S. 432, 445):

> "It is said that the State has conferred upon these Indians the right of suffrage and other rights that ordinarily belong only to citizens, and that they ought therefore, to share the burdens of government like other people who enjoy such rights. These are considerations to be addressed to Congress. It is for the legislative branch of the Government to say when these Indians shall cease to be dependent and assume the responsibilities attaching to citizenship. That is a political question, which the courts may not determine. . . ."

Or (*Tiger* v. *Western Inv. Co.*, 221 U.S. 286, 315):

> ". . . it may be taken as the settled doctrine of this court that Congress, in pursuance of the long-established

> policy of the Government, has a right to determine for itself when the guardianship which has been maintained over the Indian shall cease. It is for that body, and not the courts, to determine when the true interests of the Indian require his release from such condition of tutelage."

And so we have a scheme for transplanting people of a vastly different culture into our own culture, contrived with the hope there would be as little economic shock as is possible; we have the deliberately-expressed purpose of Congress that such portion of the former communal lands as is marked out as an economic base for the individual be handed to him intact and without charge or diminution when he shall have completed his apprenticeship in individual ownership; we have the forthright assumption of a trust to accomplish that purpose assumed pursuant to Congressional direction, and with no repudiation of that trust by Congress. Yet petitioner would have you conclude that when the government sells the trust *res* which it has never yet delivered to the allottee, in some way the allottee has engaged in an income-producing enterprise so that the government itself is entitled to share substantially in the proceeds. We ask that you recognize that this not merely is an invasion of the trust but a subversion of the entire plan of the allotment acts, and merely masquerades as a tax.

II. The Allotment, as the Capital Stake to Be Given the Allottee When Found "Competent," Was Never "Acquired" by Him Before Sale of the Timber; and His Basis for Capital-gain Purposes Is Not Different from the Proceeds of the Timber.

Petitioner says respondents were properly taxed because they enjoyed a "gain." 1939 I.R.C. § 112(a). If

they had a gain, it is because they realized upon sale of their timber an excess over its adjusted basis. *Id.*, § 111(a). Its basis was either its cost or, if it were "acquired" prior to March 1, 1913, alternatively its March 1, 1913, fair market value. *Id.*, § 113(a)(14). Regardless of when "acquired", certain adjustments must be made to derive the adjusted basis. Id., § 113(b). In this case, from the proceeds of sale of the timber there was deducted the 1913 value of the timber on the allotment. R. 20.

Another and significant part of petitioner's argument is founded on a misconception of the record—all too reasonable a misconception, we must acknowledge, though one which the respective counsel who prepared the case for trial could scarcely have felt likely.[10] Petitioner states over and over that respondents' income arises from "the cutting and sale of timber." Now that is logging, an ordinary commercial enterprise; and petitioner's reading of the record that that is the business in which respondent husband was engaged strongly flavors the argument.

Actually, all respondent husband had to do with this "cutting and sale" was to consent to the deal made by the government representative for the sale of the timber standing on his allotment. See § 61.13 of the "General Forest Regulations", 25 C.F.R. (quoted in Petr. Brf. p. 48). See the Complaint, § VII, R. 6-7; the Answer, § 7, R. 30-31; the stipulation, § VIII, R. 36. The trial judge found from this (R. 39) that in 1943 timber was cut, sold and paid for from respondent husband's land pursuant to a contract of sale by the Bureau of Indian Affairs "providing for the cutting and sale of timber from plaintiffs'

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[10] Counsel for respondents in the trial court was Kenneth R. L. Simmons, Esq., of the Montana bar, who died not long after preparing the brief in the Court of Appeals for the Ninth Circuit.

said lands".[11] To conclude from this that respondent husband, an incompetent reservation Indian, was engaged in "the cutting and sale of timber . . . an ordinary income-producing operation" (Petr. Brf. p. 17, 18, 19, 20), in the circumstances is highly incongruous.

The fact is that respondent husband, up to any time here material, never did "acquire" this land so as to have a basis for gain or loss. Never yet had he received his capital upon which he might thereafter make a gain. To

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[11] We are asking for a statement from the Bureau of Indian Affairs as to the precise manner in which this sale was conducted. We hope this will be in our hands prior to the argument and may be considered by the Court so that the distortion imported into this record for want of familiarity with the local pattern and because of the inadequately-expressed assumptions on the basis of which this case was pleaded may not mislead the Court as to the facts.

The pattern of these sales on the Quinaielt Reservation has recently been the subject of a Congressional investigation at Aberdeen, Wash., November 28, 1955 (Joint Hearing of Sub-committee on Legislative Oversight Function of the Senate Committee on Interior and Insular Affairs, and of the Sub-committee on Public Works and Natural Resources of the House Committee on Government Operations). We understand that those hearings are to be printed, though as this is written they are unavailable. The hearings disclosed the usual pattern to include the setting up from time to time of a large "cutting unit" of from hundreds to 30,000 and more acres, all covered under one contract of the government, but applicable to any given allotment only as the allottee (or, if it be "heirship status", a majority interest of the heirs) may theretofore have consented through having signed a power of attorney to the superintendent presented by the agency officials. The way these sales have been conducted was there shown to bring scandalously low prices, due to a variety of reasons including the monstrous size of the "units" so that there could be little or no competition; and a requirement that by instalments in the first three years there be paid half of the value (according to an old cruise) of the standing timber (the balance being payable as the logger cuts out the unit). As a result of this latter requirement, an immediate investment of hundreds of thousands of dollars might be required, even though the unit might take over 30 years to cut out. Certainly the ordinary

be sure, the Congressional scheme in the allotment acts discloses a purpose that the Indian shall, until his competency be established, have the use of that land. And we may, for present purposes, assume that the crops he might raise or the rentals he might receive from its current exploitation would be taxable. (We cited the cases, both ways, on this proposition in notes 2 and 3, p. 7, above.) But that use of the land does not extend to the sale of the standing timber, which is part of the land itself,

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restricted Indian on this reservation is not engaged in "the cutting and sale of timber . . . an ordinary income-producing operation" (Petr. Brf. p. 17, 18, 19, 20).

Another distortion (although we can scarcely criticize present counsel in the circumstances) arises from counsel's reading of the General Timber Sale Regulations with respect to "sustained yield" of the forest. Petr. Brf. 23-4. As was demonstrated in the Aberdeen hearing, "sustained yield" on the Olympic Peninsula and specifically on the Quinaielt Reservation, does not mean what it may mean elsewhere. In that area, opening up the forest by selecting only a part of the merchantable timber at any particular place usually results in windthrow of the entire balance. And any notion that "sustained yield" could be practiced on the relatively trifling area of a single allotment (in this case, 93.25 acres, R. 13) is bizarre. What the regulations are addressed to, and the substantial area in which they operate, is on the large forests of *tribal* timber, standing on tribally-owned lands on many reservations—*e.g.*, the Menominee Reservation in Wisconsin. For petitioner happily to conclude that "the only conclusion possible is that the value of the taxpayers' trust property was not diminished by the sale of the original standing timber; instead, it almost certainly was increased" (Petr. Brf. p. 21) is fantastic. We would think it a matter of common knowledge, of which this Court would take notice, that timberland is worth less after it is cut (whether selectively or not) than it was before, and that its price is depressed in direct proportion to the value of the stumpage removed. We would think, too, that of all places in the world where the value of the land would be overwhelmingly reduced by cutting the timber the most outstanding would be this virgin forest on the western slope of the Olympics. Cf. HOLBROOK, *Far*

United States v. Cook, 19 Wall. 591, 593. The statute and the "trust patent" both have promised that the land itself (not just part of it or part of its value) shall be turned over to him when competency is established "in fee, discharged of said trust and free of all charge or incumbrance *whatsoever*"—which plain English must mean without the trustee's taking a chunk of the *res* for its own. He must, then, look to the future for his capital; only after he receives it can he deal in it and have "gains".[12]

Corner (1952, Macmillan), pp. 239, 241-2. One of the judges (Bone, J.), familiar with the area, remarked at the argument below that it would take "hundreds of years" to replace the forest cut from the allotment.

We covered under the first heading in our argument (pp. 13, 14, n. 9, above) the proposition that the only substantial value of the allotment was in its forest.

Should there be a disposition on the part of the Court to have the case turn on these considerations now advanced by petitioner, (a) whether respondent husband engaged in the business of "cutting and sale of timber," that is, obtained the proceeds in question by engaging in the logging business; or (b) the value of the allotment before and after cutting of the timber; or (c) the "selective logging" practiced in pursuit of a "sustained-yield" program for the allotment, then we respectfully request that the Court remand the case to the district court for taking evidence on those facts.

[12] Thus, out of some $15,080.80 timber sold from this allotment, and out of the $8,418.28 paid for during the taxable year, only $1,537 was disbursed to respondents during that year. To the extent, then, of $1,537 respondent husband had had delivered to him his share of the aboriginal communal lands—that is, the proceeds of conversion of the timber. If he invest that (or if the government, *qua* trustee, invest for him the remaining proceeds), as by purchasing timber land and selling stumpage at a profit, we may concede it would be taxable, since not within the Congressional policy. This Court has so held with respect to income from invested funds the source of which had been an allotment. Superintendent Five Civ. Tr. *v.* Commissioner Int. Rev., 295 U.S. 418, 421. We believe that that would extend to capital-gains income as well as to ordinary interest and dividends. But the tax problem in such a situation, where the allottee has received his capital, is

Until the property is conveyed to respondent husband free of trust he has no more "acquired" it than the optionee "acquired" for capital-gain purposes the real property involved in *Helvering v. San Joaquin Fruit & Inv. Co.*, 297 U.S. 496, 498-9:

> ". . . The option itself was property, and doubtless was valuable. If it had been assignable, and the lessee had sold it at a profit, taxable gain would have resulted from the sale. But the option is admittedly not the same property as the land. . . . even if we should agree that a lessee-optionee acquires, by virtue of the instrument, an equitable interest in the land it would not follow that, within the contemplation of the revenue acts, he acquires the property at the date of the option rather than at the date of conveyance. . . . In the common and usual meaning of the term the land was acquired when conveyed to the respondent's predecessor."

Cf. *McFeely v. Commissioner*, 296 U.S. 102, 107.

Petitioner indicates that the "removal of timber constitutes in part a wasting of the capital asset" so that the tax laws contain provisions to exclude from tax "such portion of the proceeds of the sale of timber as represents such waste." (Petr. Brf. p. 17.) Reliance is placed on an alternative provision of the tax law under which taxpayers may recoup their basis in timber through depletion deductions. No doubt, once respondent husband were to receive his capital in the form of standing timber (impossible in this particular case), and so acquire the timber as a capital asset, he would be in economic position to elect the depletion

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very different from the situation where the government's trust to carry the portion of the ancient tribal lands into the tribal members' hands individually without charge or incumbrance had never yet been carried out.

method if it were advantageous. 1939 Code § 114(b). Even were the courts below wrong and respondents taxable on these proceeds, that would make no conceivable sense here; better they should elect the capital-gains treatment. *Id.*, § 117(k)(2). But the point is a mere distraction in the light of the essential fact here that thus far respondent husband has not received the capital asset to deplete. And it borders on the inane to say on these facts, where all respondents did was to assent to the sale by the government, that what was received for the timber was only "in part" the value of that asset. It is all respondents got or ever will get for that asset. No part of it represented their own labor or enterprise; there was simple substitution of the cash asset for the timber, both held by the government.

This point is urged because our opposition to the petition asserted that *Jones* v. *Tannah* (C.A. 10th, 1951), 186 F. 2d 445, cert. den. 341 U.S. 904, was distinguishable as involving oil royalties from a restricted allotment—the annual payment of which represented restoration of the basic capital itself (under the liberal oil-depletion provisions) and the other part the annual product of the land. This Court itself had pointed out that "The depletion effected by production is likened to the depreciation of machinery or the using up of raw materials in manufacturing. . . . The deduction is therefore permitted . . . as compensation for the capital assets consumed in the production of income through the severance of the minerals." *Anderson* v. *Helvering*, 310 U.S. 404, 407-8. (See, also, *Helvering* v. *Elbe Oil Land Co.*, 303 U.S. 372, 375; *Badger Oil Co.* v. *Commissioner Int. Rev.*, C.A. 5th, 1941, 118 F. 2d 791, 793.) But it is no answer in this case that respondents might have elected a useless depletion deduction, for (a) they were not engaged in the annual cutting and sale of timber; they were not in the logging business at all; (b) that deduction is not, in the case of timber, even roughly designed

to accord the Indian the unincumbered value of his allotted land, since it would not return the current value, but only the March 1, 1913, value; and nothing less than the full capital value of the land (timber) could substitute for getting that land "free of all charge or incumbrance whatsoever"; (c) finally, this was treated as sale of a capital asset, and we know of no reason why the election would not be conclusive on petitioner.

Though respondent, as a result of the tax, has neither the unincumbered land which Congress has promised him out of the ancestral holdings nor the undiminished proceeds, petitioner rings the changes on the doctrine stemming from *Willcuts* v. *Bunn*, 282 U.S. 216, 227-228, that a tax on profits arising from sale of property is not a tax on the property itself. Thus, in *United States Trust Co.* v. *Helvering*, 307 U.S. 57, 60, it was held that an estate tax is not a tax upon the property of which the estate was composed but an excise upon the transfer or shifting in relationships of property at death. Does that apply to allotted lands still under trust as are those of respondents? A reading of petitioner's brief (pp. 25-29) seems to say so, over and over again, relying on *Oklahoma Tax Comm.* v. *United States*, 319 U.S. 598.

That case held precisely the contrary of what petitioner asserts; petitioner happily relies only on so much as relates to the non-restricted-land property involved (p. 600). Here is what this Court held with respect to so much as is material here (pp. 610-11):

> "The validity of the taxes on the transfer of the land presents a somewhat different problem. Some of these lands are exempt from direct taxation by virtue of explicit congressional command. The Act of May 10, 1928, 45 Stat. 495, for example, provides that Indians of a class which includes the three deceased should

> select up to 160 acres of his allotted, inherited or devised restricted lands, which 'shall remain exempt from taxation while the title remains in the Indian designated . . . or in any fullblood Indian heir or devisee,' while all other restricted lands are made subject to taxation by Oklahoma. The State argues that congressional exemption of the land from direct state taxation does not exempt the land from an estate tax, because of the principles announced in *United States Trust Co.* v. *Helvering*, *supra*. A majority of the Court concludes that this principle does not apply to Indian lands specifically exempted from direct taxation. We therefore hold that the transfer of those lands which Congress has exempted from direct taxation by the State are also exempted from estate taxes."

That holding disposes of petitioner's citations of *Graves* v. *N. Y. ex rel. O'Keefe*, 306 U.S. 466, and *O'Malley* v. *Woodrough*, 307 U.S. 277, since those cases were specifically discussed and the ruling we have quoted was therefore formulated with those cases in mind. The two later *Oklahoma Tax Comm.* cases relied on by petitioner involve, respectively, property other than restricted or tax-exempt lands (*West* v. *Oklahoma Tax Comm.*, 334 U.S. 717), and a tax not on the Indians at all but one against lessees under oil-and-gas leases of restricted Indian land, the tax being an excise on the production of oil by the lessees—the Court noting (p. 353) that "There is no possibility that ultimate liability for the taxes may fall upon the [Indian] owner of the land" (*Oklahoma Tax Comm.* v. *Texas Co.*, 336 U.S. 342).

Repeatedly petitioner relies on one particular case, pointing out that it was cited "with approval" in the case of *Oklahoma Tax Comm.* v. *United States*, 319 U.S. 598, which latter case, as demonstrated by the quotation above, peti-

tioner has misread. That case is *Landman v. Commissioner Int. Rev.* (C.A. 10th, 1941), 123 F. 2d 787, cert. den. 315 U.S. 810. Its use without more compounds the misleading quality of this portion of petitioner's argument. For the holding of that case that an estate tax is merely an "excise tax upon the shifting of the economic burdens and benefits, or on the privilege of transferring property of decedent at death" (123 F. 2d at p. 790) was directly read from *United States Tr. Co. v. Helvering*, 307 U.S. 57, which this Court specifically held, as we have quoted, does not apply to restricted Indian lands. And why petitioner would cite to you only the one *Landman* case, while there are two later *Landman* cases which clearly dissipate this argument petitioner builds on the older one, is perplexing:

(1) *Landman v. United States* (1945), 103 C. Cls. 199; 58 F. Supp. 836, following not long after the 319 U.S. *Oklahoma Tax Comm.* case, specifically held that a restricted allotment itself is not subject to federal estate tax, the Court of Claims quoting (103 C. Cls. at p. 209) not only this Court's majority opinion, but the minority opinion to the same effect (319 U.S. at p. 614, n. 2). Possibly because the Court of Claims reading of this Court's determination was so plainly correct certiorari was not applied for.

(2) *Landman v. United States* (1947), 109 C. Cls. 1, 71 F. Supp. 640, cert. den. 332 U.S. 815, held again that restricted allotted land was not includable in gross estate for the sake of the federal estate-tax laws, but held that oil and gas royalties, reinvested in bonds, livestock, and real estate, was subject to the tax—a flat agreement with the decision of this Court as to the state taxes involved in the 319 U.S. *Oklahoma Tax Comm.* case, and in accord, it later developed, with this Court's holding as to state taxes in the 334 *U.S. Oklahoma Tax Comm.* case. And the Court of Claims specifically noted that the rationale of the first

Landman case (C.A. 10—the one cited by petitioner) "seems to us to be in conflict with what we conclude, as above shown, to be the rationale of the decision in *Oklahoma Tax Commission v. United States*, *supra*, [319 U.S. 598], holding that the allotted lands there involved were immune from the Oklahoma estate tax."

Petitioner's remaining answer is that "these Indians are not entitled to any better treatment than is accorded to other taxpayers who own timber lands and who are taxed with income as it is realized." (Petr. Brf. pp. 20-21, n. 7.) This bespeaks a subtle prejudice we urgently wish to point up.

Of course Indians are not entitled to "better treatment" than other taxpayers. But that there may be special Congressional policy with respect to some of them is no more remarkable than that there may be some special policy with respect to labor organizations or farmers or mutual insurance companies. And where one of the more fortunate Indians, "competent" or not, engages in the ordinary acquisition of timber lands and the cutting and sale of forest products, he is in every respect on the same basis as his non-Indian neighbor. There are thousands of Indians who are "competent"; who have received their lands in fee (and may have sold or lost them), and who pay federal income taxes exactly as do any non-Indians.

But there are also thousands of tribal Indians in this country who present a special problem, a problem not readily solved. It is common experience that nearly any uninformed person will hold forth readily as to the solution of the "Indian problem"—which solution usually consists of the assertedly-simple expedient of putting Indians on just the same basis as "everyone else". There is never a thought to deeply established cultural barriers which cannot be abolished by legislative fiat or court decision, including cultural values just as stubbornly held by most

Indian communities as by our own. There is never a thought to the tribal government as a government, with its own laws and ways of adjudging conflicts, and self assurance of its virtues frequently equal to our own. There is never a thought to tribal property, and the variety of communal existence which makes the "Indian problem" not a single problem but a whole gamut.

May the solution be reached merely on the basis of the offhand, uninformed and prejudiced view which petitioner advances in this statement? May this Court—with or without its own notions as to solutions—attempt to fashion some portion of remedy on those limited occasions when some case touching the Indians comes before it? Or is not Congress the keeper of the national conscience[13] must there not be applied to *these* Indians—non-competent, full-blood, reservation Indians—the policy and purpose in dealing with the problem which Congress has provided?

And does application to these Indians of valid federal law designed for the very purpose of carrying out the Congressional policy accord them "any better treatment than is accorded to other taxpayers"?

Conclusion

The judgment below should be affirmed.

Respectfully submitted,

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Counsel for Respondents.

GLEN A. WILKINSON,
ROBERT W. BARKER,
Of Counsel.

[13] *Cf. United States v. Realty Co.*, 163 U.S. 427; *Pope v. United States*, 323 U.S. 1, 9-10.

No. 134

In the Supreme Court of the United States

October Term, 1955.

CLARK SQUIRE, COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF WASHINGTON, *Petitioner,*

vs.

HORTON CAPOEMAN AND EMMA CAPOEMAN, HIS WIFE.

On a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE.*

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*.

Comes now the applicant, George H. Brasier, and moves the Court for an order granting leave to file a comprehensive brief *amicus curiae* in the herein cause for the following reasons hereinafter enumerated, to-wit:

1. That the applicant is now engaged in prosecuting an income controversy, *Brasier* v. *United States, et al.*, involving the issues presented in the instant cause and pending on appeal before the Court of Appeals for the Tenth Circuit. That the applicant is proceeding in the above mentioned controversy *pro se* as attorney-in-fact, pursuant to his substantive prerogatives in the premise, in an effort to stay the tax gatherers in their unlawful purpose and to recover that which has been alleged to be unlawfully assessed and collected from increments derived by the United States, as trustee, in behalf of its sovereign ward, Mary Brasier, Osage Indian Allottee No. 666, as her pro-rata share of

head-right interests in the mineral rights of the Osage Indian Nation.

2. The Solicitor General, in his petition for writ of certiorari, has stated that the instant case is one of continuing importance in the administration of the revenue laws and to approximately 225,000 Indians holding a total of about 13,600,000 acres of restricted, allotted lands with "income" of more than $12,300,000 in the form of rents, royalties, bonuses from oil and gas leases and from the sale of timber from these restricted, allotted lands. In summing up these facts and figures, the allotted lands would amount to about 60 acres per allottee, and about $50.00 yearly "income" derived from these allotted lands, by the trustee, per allottee. (Pet. 8-9)

The applicant, having read the petition and brief in opposition in the herein controversy, bringing forth the issue of a conflict before this Honorable Court, and being cognizant of the need for a more comprehensive presentation of the facts and questions of law, relevant to the complete disposition of the instant controversy, and to the 225,000 Indian allottees who will be affected by the outcome, files the herein motion. In respect to the facts, the immutable enunciation by the Honorable Harold L. Ickes, found in the Foreward of the Handbook of the Federal Indian Law, is considered appropriate and authoritative. Applicant quotes in part and makes said Handbook and the Supplement thereof a part hereof by reference:

> "That Indians have legal rights is a matter of little practical consequence unless the Indians themselves and those who deal with them are aware of those rights. Such, however, is the complexity of the body of Indian law, based upon more than 4,000 treaties and statutes and upon thousands of judicial decisions and adminis-

trative rulings, rendered during a century and a half, that one can well understand the vast ignorance of the subject that prevails even in ordinary well informed quarters. For more than a century, commissioners of Indian affairs have appealed for aid in reducing this unmanagable mass of materials to some orderly form. Yet during that period none of the attempts to compile a simple manual of the subject was carried to completion.

"Ignorance of one's legal rights is always the handmaid of despotism. This Handbook of Federal Indian Law should give to Indians useful weapons in the continual struggle that every minority must wage to maintain its liberaties, and at the same time it should give to those who deal with Indians, whether on behalf of the federal or state governments or as private individuals, the understanding which may prevent oppression."

In regard to the questions of law, *supra*, applicant sets out the following:

(*a*) Whether the Sixteenth Amendment to the Constitution of the United States amends Artiele I, Section 2, Clause 3, where it is expressly stated: "and excluding Indians not taxed," to include Indians not taxed, where they (Indians)[1] are not specifically mentioned therein.

(b) Whether trust allotments, held in trust by the United States for individual Indian Allottees, are technically properties of the United States, until such time as the trust allotments are delivered at the end of the designated period, in absolute title fee to the allottee.

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[1] Indians as we knew them in our early history, in the building of this Nation, (with their lands), are the Indians of to-day—unemancipated, and under the protection supervision and care of the United States. Their sovereignty as Internal Nations being transferred to the United States by the Act of March 3, 1871 (16 Stat. 544, 566, R. S. Sec. 2079).

SUPREME COURT, U. S.

JAN 6 1956

HAROLD B. WILLEY, Clerk

No. 134

In the Supreme Court of the United States

OCTOBER TERM, 1955

CLARK SQUIRE, COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF WASHINGTON, PETITIONER

v.

HORTON CAPOEMAN AND EMMA CAPOEMAN, HIS WIFE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF AMICUS CURIAE

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REASON FOR BRIEF

The following brief amicus curiae is being submitted in behalf of the Coeur d'Alene Tribe, Coeur d'Alene Indian Reservation, Idaho, and the Affiliated Tribes of Northwest Indians of which almost all, if not all, the tribes of Montana, Idaho, Oregon and Washington are members. Each of these tribes feels it has a direct interest in the outcome of this case. The Coeur d'Alene Tribe is typical in that it has both unallotted tribal land and land allotted to particular Indians. Allotted Indians derive income both from sale of timber and from agricultural leases.

Robert D. Dellwo, of Counsel, is attorney for Julia Nicodemus, an enrolled member of the Coeur d'Alene Tribe who is plaintiff in the Indian tax case, *Julia Nicodemus* v. *United States of America*, 132 F. Supp. 608, which was decided in favor of the Indian plaintiff. Her suit is similar to that of plaintiff in captioned case, except it is for a refund of taxes paid on agricultural rentals from Indian trust property either initially allotted her or inherited by her. Her case therefore carries with it a broader question than instant case—the question of whether or not agricultural rentals from such property are taxable under the income tax laws of the United States. This brief will therefore be restricted to a discussion of the law pertaining to the taxability of general income, regardless of source, from Indian trust property.

QUESTION PRESENTED

Whether income from allotted, restricted land held in trust by the United States for noncompetent Quinaielt Indians is exempt from federal income tax.

SUMMARY OF ARGUMENT

The pertinent treaty, the General Allotment Act of 1887 and the trust patents issued thereunder by plain implication exempt the income from allotted, restricted Indian lands from federal income tax. This implication springs not only from a logical interpretation of said treaty and General Allotment Act and the trust patents issued thereunder but from the general case law of the

courts of this country governing the interpretation of such treaties and the difference in the application of tax laws to Indians, such as plaintiffs, and to non-Indians.

As a part of the foregoing argument is a second argument that, if said treaty and General Allotment Act do not by plain implication provide such exemption, the ambiguity or doubt as to whether they do or not has already been resolved in favor of exemption by the Government of the United States through the Department of Interior and the Bureau of Internal Revenue. In this regard, it is clear that the Government of the United States, the dominant party which drew all the treaties and agreements upon which this claimed exemption is based throughout the country, has, until recently, uniformly interpreted said treaties and agreements in favor of exemption. This interpretation was not of the nature of administrative interpretation of the law by government employees not binding on the government but was of the nature of an interpretation of a contract, treaty or agreement by the dominant party. Not only were the Indians entitled to rely on such interpretation, but the government, as the dominant party to the contract, treaty or agreement interpreted, is now estopped to deny its own interpretation.

ARGUMENT

INCOME DERIVED BY INDIAN ALLOTTEES FROM LAND HELD IN TRUST FOR THEM BY THE UNITED STATES IS NOT SUBJECT TO FEDERAL INCOME TAX.

The treaty with the Quinaielts, 12 Stat. 971, of which pertinent portions are quoted on page 39 in petitioner's brief, provided for the setting aside of a certain area of land for the "exclusive use" of the members of said tribe of Indians. As a part of this treaty the tribe gave up its aboriginal rights to vast areas of valuable land. In the making of the treaty the United States, in effect, treated the tribe as a sovereign nation and in return for vast concessions by the tribe, consisting of a conveyance to the United States of its vast lands, that tribe was to have the exclusive use forever of the small area of land which ultimately became the Indian Reservation.

One can study this treaty or any other Indian treaty in the United States in vain for any intent on the part of the contracting parties to do other than reserve forever for the exclusive use of the Indians the lands reserved for them. Such use was apparently to be a collective, communal use or perhaps the Indian nations themselves were to devise some manner of division of the property among their members. At any rate, in due course, the General Allotment Act of 1887, 24 Stat. 388, 25 USCA 331 et seq., was passed by the Congress of the United States.

This Act provided for the allotment to individual members of the various tribes, including the Quinaielts, of portions of the reservation upon which individual Indians might be able to make a living in agricultural or grazing pursuits. The intent of this Act was to assign to particular Indians specific portions of land. This assignment was called an "Allotment."

To effectuate these allotments trust patents were issued and, in accordance with the General Allotment Act of 1887, the trust patents were to provide and did provide that the United States Government would hold such land in trust for the particular Indian allottee for the "sole use and benefit of the Indian" and would ultimately, at the termination of the trust, convey the same to "said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever." The Act then provided that any contracts touching the land prior to the expiration of the trust would be null and void. This provision was to protect the Indian against any possibility that he himself or anyone else might, in effect, encumber the property.

The Act then provided (25 USCA, Sec. 348) that at the conclusion of the allotment and the issuing of the fee patents the Indian allottee would, in effect, become subject to and have the benefit of the laws of the state or territory in which he resides.

A. *The Quinaielt Treaty and subsequent legislation plainly imply exemption from Federal Income Tax.*

Whereas, the case of *Jones v. Taunah*, 186 F. 2d 445, and the Government, in this case, seek to apply the general law that exemption from income tax is never implied, the fact is that in the field of law known as "Indian Law," as distinct from "White Man's Law," immunity from taxation of restricted Indian property and income therefrom is implied unless expressly covered.

The case of *Lewellyn* v. *Colonial Trust Company*, 17 F. 2d 36, demonstrates the distinction between "Indian Law" and "White Man's Law."

> "That as legislation imposing taxation by government on citizens must be clear and free from doubts, and all doubts therein must be resolved in favor of the citizen (citing cases) any legislation by government imposing taxation on its dependent ward must be in certain and indubitable terms. (Choate v. Trapp, 244 U. S. 665).
>
> "That, in the absence of any expressed purpose of Congress to change the uniform and unbroken policy of the government to regard and deal with the Indian tribes as wards and dependents, the purpose and intent of Congress to change that policy, and impose a tax by government on its wards, will not be implied, and the general terms of the income tax statute should not be construed to embrace the Indian wards of the government."
>
> In support of this, reference is made to the Quapaw Indians, 34 Ops. Atty. Gen. 439, where it is said, 'In other words, it is not lightly to be assumed that Congress intended to tax the ward for the benemit of the guardian,' and Choate v. Trapp, supra, where it is said 'The construction, instead of being strict, is liberal; doubtful expressions, instead of being resolved in favor of the U. S., are to be resolved in favor of a week and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith.'
>
> "A conclusion in line with U. W. v. Rickert, 188 U. S. 432, and others, where it is held: 'That general acts of Congress do not apply to Indians unless so worked that they clearly manifest an intention to include them in their operation.'"

Does the Income tax law clearly apply to the Indians' income from trust property? The reverse of this question is: Was there not rather an implied, if not express, agreement that such income would be exempt from income tax?

We find that not only are the Income tax laws strictly construed so as not to apply to Indian incomes from tribal and allotted Indian land unless specifically provided but that, on the other hand, the treaties with and laws governing Indians with regards to Indian property are liberally construed and doubtful expressions are resolved in favor of the Indians.

For example, in *Carpenter v. Shaw*, 280 U. S. 363, the State of Oklahoma sought to tax oil royalties coming to individual Indians from allotted lands in a manner similar to the present Timber Income. The Court denied the right to tax because the original "agreement" provided that "all the lands allotted shall be nontaxable while the title remains in the original allottees."

The State of Oklahoma contended that this agreement, strictly construed, limited the nontaxability to the land and not to the income from the land. It argued that the severed oil and gas were personalty and not realty. This, of course, is the general "White Man's Law" but what did the Court do? It held:

> "While in general tax exemptions are not to be presumed and statutes conferring them are strictly construed, the contrary is the rule to be applied to tax exemptions secured by Indians by agreement between them and the national government.

> "Such provisions are to be liberally construed. Doubtful expressions are to be resolved in favor of the weak and defenseless people who are wards of the nation, dependent upon its protection and good faith. Hence, in the words of Chief Justice Marshall: 'The language used in treaties with the Indians should never be construed to their prejudice. If words be made use of, which are susceptible of a more extended meaning than their plan import, as connected with the tenor of the treaty, they should be considered as used only in the latter sense.' . . . and they must be construed, not according to their technical meaning, but *'in the sense in which they would be naturally understood by the Indians'.*" Jones v. Meehan, 175 U. S. 1. (underlining ours).

The Court then held that the provision that the "lands shall remain nontaxable" cannot be taken to be restricted only to those taxes commonly known as land or real estate taxes but must be deemed at least to embrace a tax assessed against the allottees with respect to a legal interest in their allotment less than the whole, and stated:

> "We think it plain that the tax imposed on the royalty interest of the present petitioners is not a tax on oil and gas severed from the realty, but is, by its very terms, a tax upon the right reserved in them as lessors and owners of the fee. . ."

How similar to instant case except, in the above case, the courts were denying the right of a state to tax income from the trust property, holding that what was being taxed was not really income but a right as owners.

In *Choate v. Trapp*, 224 U. S. 665, officers of the State of Oklahoma instituted proceedings to collect taxes on

lands similarly allotted to Indians. It discusses the contract that resulted between the Government and the Indians.

It states that the individual Indian had no title or enforceable right to tribal property, but did have an equitable interest in tribal land and general public domain which Congress recognized and which Congress desired to extinguish. The Congress offered a patent of nontaxable land only to those who would relinquish their claim in other property that the tribe formerly held for common use. The Court continues:

> "There was here, then, an offer of nontaxable land. Acceptance by the party to whom the offer was made, with consequent relinquishment of all claim to other lands, furnished a part of the consideration'. . . Upon delivery of the patent the agreement was executed and the Indian was thereby vested with all the right conveyed by the patent . . .

> "The patent and the legislation of Congress must be construed together, and when so construed, they show that Congress, in consideration of the Indians' relinquishment of all claim to the common property, and for other satisfactory reasons, made a grant of land which should be nontaxable for a limited period. . .

> ". . . It is conceded that no right which was actually conferred on the Indians can be arbitrarily abrogated by statute. But it is claimed that he, in fact, acquired no valid exemption, since it stands on a different footing from the grant of the land itself; and that, though the provision of nontaxability added to the value of the property, it can be withdrawn, be-

cause, if not a gratuity, it is at least subject to the general rule that tax exemptions are to be strictly construed and are subject to repeal unless the contrary clearly appears . . . (then citing the cases) . . . but these rulings are based on the theory that 'the legislature was not making promises,' but framing a scheme of public revenue. . .

" . . . BUT IN THE GOVERNMENT'S DEALINGS WITH THE INDIANS THE RULE IS EXACTLY THE CONTRARY. THE CONSTRUCTION, INSTEAD OF BEING STRICT IS LIBERAL; (caps ours) doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith. This rule of construction has been recognized, without exception for more than a hundred years, and has been applied to tax cases.

" . . . if there is any question as to whether this was a personal privilege and repealable, or an incident attached to the land itself for a limited period, that doubt, under this rule, must be resolved in favor of the patentees. . . "

The foregoing excerpts are quoted to show that it is the settled law to recognize certain tax exemptions or Indian trust property and that all doubts are resolved in favor of the Indians.

We must keep in mind that this whole field of law applies to Indians in their status of wards or holders of the beneficial interest in Indian land allotted to them as in the foregoing cases. The Indian in all other aspects is subject to the same responsibilities to pay taxes as are other citizens.

A landmark case is the case of *Choteau* v. *Commissioner of Internal Revenue*, 38 F. 2d 976, and affirmed in the U. S. Supreme Court on Writ of Certiorari (238 U. S. 691). This is a consolidation of several cases and is easily misunderstood. It concerns the allotments of members of the Osage tribe. Each could select 3 pieces of land of 160 acres each, one of which would constitute a homestead. Further there was certain tribal income from royalties which would go to the United States Treasury for later division. A certificate of competency there, if granted, (different from the Quinaielts) not only removed restrictions on the individual but also on the land. There were similar provisions against incumbrance, etc. The Federal Government sought to levy income tax against this various income. As to Mary Blackbird, a restricted full blood member of the Osage Tribe, the Court held that her income from the trust property was not taxable. The Court says:

> "Her property is under the supervising control of the U. S. She is its ward, and we cannot agree that because the income statute . . . subjects 'the net income of every individual' to the tax, this is alone sufficient to make the acts applicable to her. Such holding would be contrary to the almost unbroken policy of Congress in dealing with the Indian wards and their affairs . . . citing Elk v. Wilkins, 112 U. S. 94, as stating 'General acts of Congress did not apply to Indians, unless so expressed as to clearly manifest an intention to include them'."

The case then cited *Choate* v. *Trapp* on the rule that tax statute exemptions are strictly construed generally but

liberally construed as to Indians, then quotes with approval the Attorney General's opinions cited therein as follows:

> "This practice of safeguarding the Indian has been continuously adhered to. Treaties have been considered, not according to their technical meaning, but in the sense in which they would be naturally understood by the Indians . . . citing cases . . : The Indian has always been the object of special legislation. Never has it been the practice to legislate for him generally along with the rest of the people."

The Court then held for Mary Blackbird but held against Mrs. Pettit and Henry Choteau because they did not come within the definition of Indian wards, Mrs. Pettit being white and he having been issued a certificate of competency.

In *United States v. Homerath*, 40 F. 2d 305, we have facts almost identical to instant case, a noncompetent Indian with allotted lands under the General Allotment Act with a trust deed identical to the one in this case. The first allottee conveyed, with consent of the Interior Department, her interest to her noncompetent son for support during her life. The Court said:

> "It would serve no useful purpose for this court to express extended views upon the problems suggested by this setup of facts. It appears that both the grantor and grantee as Indians were noncompetent and under restriction and that the lands in controversy were likewise under restriction. Ordinarily a noncompetent Indian, being a ward of the Government, is not subject to income tax law. If the restriction applies

therefore to the individual he would not be subject to the payment of income tax.

"If the restriction applies to the land, I am of the opinion that it still existed after the deed from mother to her son was delivered and after the death of the mother. . . Inasmuch as the act itself provided that it can only be transferred on such terms and conditions and other such rules and regulations as the Secretary of Interior might prescribe, I am inclined to the view that the land still retained its restricted character and, being in the ownership and possession of a noncompetent Indian, is not assessable as to the income derived therefrom."

In view of the foregoing there is little question that that Court would have decided in favor of respondent herein.

The case of *Pitman v. Commissioner of Internal Revenue*, 64 F. 2d 740, was an appeal from a decision of the Board of Tax Appeals in which petitioner was a full blood member of the Creek Tribe married to a white man. Their son was allotted about 40 acres of land as a homestead and about 120 acres as a "surplus allotment," which on his death descended to petitioner, (his mother) "by inheritance."

It is to be remembered that the method of allotment in that cast was different from that on the Quinaelt Reservation and the Court distinguished between the homestead and the surplus allotment. It found that, by reason of the statutes pertaining to the particular allotments in that case, the surplus allotment of the half blood son came to lose all restrictions prior to his death but:

"The homestead portion of the allotment, however,

> remained subject to the restrictions provided in Section, supra, until the death of Pitman, Jr., the original Allottee. Upon his death it passed by inheritance to the petitioner, a full-blood Indian heir, and became subject to the qualified restrictions imposed by Section 9, supra, and remained exempt from taxation . . . citing cases. We conclude therefore, that the homestead remained restricted and exempt from taxation, and that the surplus allotment became freed of restrictions and subject to taxation . . ."

The question at issue was whether the oil and gas royalties and bonuses derived by the full blood mother were subject to income tax. Syllabus 7 answers that question as follows:

> "Where enrolled half-blood Creek Indians homestead and surplus allotments were inherited by full-blood Indian, who, in 1922, executed approved oil and gas leases, bonuses received in 1922 for leases of surplus allotment held taxable to lessor as 'income' after proper depletion allowances, but bonuses for leases of homestead allotment were not taxable."

In the present case we have no such thing as a surplus allotment. The land here is equivalent to the "homestead allotment" of petitioner's son in the foregoing case. There is, therefore, no doubt that had that Court had the present case under consideration it would have held the income involved here not taxable. See *Landman* v. *U. S.*, 71 F. Supp. 640, holding that similar lands are not includable for estate tax purposes and that, "While, in general, tax exemptions are not to be presumed and statutes conferring them are to be strictly construed, tax exemptions secured to Indians by agreement between them and the Govern-

ment are to be liberally construed." This case specifically, on page 647, overrules the earlier case of *Landman v. Commissioner*, 123 F. 2d 787, which held such property includable for estate tax purposes.

We could cite numerous other authorities establishing the difference between "White Man's Law" and the "Indian Law" with respect to taxing statutes. All of them hinge on two fundamental principles. These may be stated in the following two questions:

1. Does the tax expressly include the Indians and the pertinent income?
2. What was the understanding of the Indians with regards to the "nontaxability" provisions in their treaties and allotments; and the provision that the lands, hence the income, was for their "sole use and benefit?"

It is submitted that the present tax does not expressly include the Indians and that the case law itself is excellent evidence of the understanding of the Indians in their treaties and allotments in this regard.

B. It was the understanding of the Indians as contracting parties that the income from their allotted lands would be free from taxation.

What did the Indians agree to? Certainly the words of the agreements, the Allotment Act and the trust patents are in themselves insufficient to answer this question fully. As in all contracts, we must go to the acts of the parties. How did the parties act and deal with each other with regards to their agreements?

The whole question becomes essentially this: Can the Commissioner of Indian Affairs, the Secretary of Interior and all their agents counsel and advise the Indians that the agreement provides for such an income tax exemption and that the Indians don't have to pay income taxes on the income from trust property and then, another arm of the Government which had nothing to do with the forming of the agreement come in at a later date and contend that that wasn't the agreement at all and that the Department of Interior had no authority to bind the United States Government in such an understanding?

Or is it not the better law that Uncle Sam must stand behind his agreements and that the Indian agents were authorized representatives of Uncle Sam in making and interpreting agreements with Indians?

After the agreements and allotments were made; one by one all the various questions of taxation began to plague the American Indian. Through the years the Indian agents and their superiors defended the Indians against these threatened invasions. Without citing the cases in detail, a mere glance at the annotations of the General Allotment Act in 25 USCA 331 et seq. shows the sequence of these cases in which counties, cities and states were denied the right to tax Indian property and income. Creditors were denied the right of liens, attachment and foreclosure, and the Federal Government was denied the right of inheritance and estate tax.

During all these years the Indians were asking their

tribal leaders, their priests, ministers and other advisers, and then Government agents whether they had to pay income taxes on the income from trust property. Always the answer was "No." Indians sought at times to file income tax returns, and were told by Internal Revenue agents that such income was not taxable.

Suddenly, after years of such conditioning, the Bureau of Internal Revenue moved against many of the Indians of the Coeur d'Alene and other reservations and levied taxes not only for current years but for past years, adding 25% penalties for failure to file returns, attaching current income without regard to their current financial needs, and reducing such Indians as Julia Nicodemus to abject poverty and open rebellion against the guardian who had turned on them.

Every Indian agency is replete with instances of interpretation by agents of both the Indian Bureau and the Bureau of Internal Revenue of the pertinent treaty agreement, Allotment Act and trust patents, showing a course of conduct through the years of recognizing and substantiating the Indian belief that the income from trust property was not taxable.

For example, the leaders and advisers of Indian tribes all over the nation have copies of the HANDBOOK OF FEDERAL INDIAN LAW by Felix S. Cohen, then Chairman, Board of Appeals, Department of the Interior, with Foreword by Harold L. Ickes, then Secretary of Interior, and printed in 1941, 1942 and 1945 by the U. S.

Government Printing Office. It is acceptable by the Indians as the official interpretation by Uncle Sam of various Indian laws, including the ones pertinent to this action.

Chapter 13, page 254 is devoted to the subject of taxation. The chapter discusses the various fields of taxation. On pages 258 and 259 the effect of the General Allotment Act is discussed. Among other similar quotations it quotes with approval the case of *United States* v. *Nez Perce County, Idaho*, 95 F. 2d 232, as follows:

> "The allotment act, as well as the trust patent, by plain implication granted the Indian immunity from taxation during the trust period or any extension of it, and he had the right to finally receive his lands 'free of all charge or incumbrance whatsoever.' The authorities are uniform to the effect that this right of exemption is a vested right, as much a part of the grant as the land itself . . . etc. . ."

The book continues, "Therefore, it would appear that the allottee under the General Allotment Act obtains a vested right to tax exemption which cannot be taken from him without his consent." The question now is whether this vested right to tax exemption includes an exemption from income taxes.

Page 265, et seq., concerns itself with Federal income taxes, as follows:

> "In considering federal taxation of Indian income, one finds the courts concerned, not as in the case of the state, with the question of whether the state may tax, but with the question of whether the Federal Government has intended to tax. Whether it has done

Government has intended to tax. Whether it has done so in a particular case depends on the construction accorded the taxing statute by the courts. The rule of construction most recently announced is that the Federal Income Tax Law, applying as it does to the income of 'every individual' and to income derived 'from any source whatever,' includes within its application Indians and their income unless they are by agreement or statute exempted.

"It is clear that the exemption accorded tribal and restricted Indian lands extends to the income derived directly therefrom. Accordingly, rents, royalties and other income of Quapaw, Otoe, Otoe and Missouri, and Ponca Indians have been held tax exempt. Likewise, the income derived by individual Indians as their share in the oil or mineral deposits in tribal lands has been held tax exempt.

"Conversely, income which is derived from unrestricted lands has been held taxable . . . Though income derived directly from restricted allotted lands is exempt from federal income taxation, so-called reinvestment income is subject to such taxation."

The foregoing is just a sample of the literature published on this subject for the guidance of Indians, showing what the Indians have been lead to believe by representatives of the Federal Government, the other contracting party.

That the government always considered, until the *Jones* v. *Taunah* case in 1951, income taxes of incomes from land to be a forbidden charge upon the land is clear in all the literature published and circulated by the government until the last few years. (See 34 Op. Atty. Gen. 302; 34 Op. Atty. Gen. 439; 35 Op. Atty. Gen. 107.)

Should the government, not only as a contracting party but as a dominant party dictating a contract or treaty to a weak and defenseless people, now be able to change the studied interpretation it gave to those contracts from the first federal income tax statute to the *Jones v. Tannah* case?

It is apparent that the Ninth Circuit, in deciding instant case, did not think so and considered it a "sorry breach of faith" with these Indians. Judge Clark in *Nicodemus v. United States*, 132 F. Supp. 608, in which the writer was counsel for plaintiff was of a similar opinion. Both courts walked right through the maze of law cited by the Government to the core of the question. That core was the obligations of a great and powerful nation with regards to its solemn promises in dealing with these dependent and defenseless people. Judge Clark in the Nicodemus case discussed this point as follows:

> "The land in question here from which the crops were grown are allotted lands. These allotted lands were set aside to be held forever as Indian lands and it was agreed that no part of said reservation should ever be sold, occupied, open to white settlement, or otherwise disposed of, without the consent of the Indians residing on said reservation; that subsequent application of allotment acts to be effective would have to be made with the consent and agreement of the Indians, and carried with it a contractual obligation of the Government to hold said lands free from such obligation during the trust period and its extension.
>
> "This has been recognized through the years and the testimony of the Indians in support of their con-

tention is that not only did the government through the years recognize the validity of their understanding but through its Indian agents and official documents, among which was the *Handbook of Indian Law* furnished by the Department of Interior, fully advised the Indians that their interpretation was correct.

"Right at the threshold of this inquiry we have to look into the past. Our past history has demonstrated the desire of the Federal power to protect Indians. Much has been said in opinions of the Court heretofore rendered, as to our duties to protect this helpless and dependent people, and this is the just rule to follow. This great race of people has been depleted in numbers; they are helpless; they are under the political power and control of the government of the United States; they are its wards; it is the government's duty, as long as the wardship over the Indians exists, to proceed to protect the Indian lands, and in cases such as this, to assert their exemption from taxation, if the circumstances warrant. . . .

"The government contends that the Indian status as a ward of the government provides no valid reason for excluding his income from the scope of the taxing statutes, and advance the theory that it was the intent of Congress to levy the tax with respect to all residents of the United States, and upon all sorts of income, and that there is no exception exempting the sort of income here involved. The most that can be said about the statute is that it is broad enough to include all citizens; however, it does not use the words 'including Indians.' It is reasonable to say that Congress gave no thought to the Indians at all. They must have had in mind, as stated in plaintiff's brief, the history of the dealings, the treaties and agreements the United States made with the vanquished Indians prior to the passage of this act. Certainly the Indians

were not consulted, nor did they have any opportunity to assert their rights under their agreements and understandings that were in full force and effect at the time of the passage of this act. When these agreements were first made with the Indians it was with the thought in mind that the negotiations should be fair. The government of the United States was represented at the counsel table with the superiorly equipped race. They dictated the terms the Indians had to accept. There can be no question that the Indians were unable to interpret the agreements and were more or less coerced in making them, and we find, upon investigation, that the agreements were generally signed with an 'X' mark, witnessed by the Indian agent, and as contended by the plaintiff, there is no evidence of any contribution made to the agreement by a single Indian, or any change in it at the conference where it was supposedly negotiated. Are we going to say that the Government will take advantage of the general statement in the income tax bill that all citizens and residents are taxed, to the disadvantage of an illiterate and uneducated people? They are still treated as incompetent wards of the Indian Bureau, and leases are prepared and negotiated and their rentals collected by the Indian Agencies."

The court then concludes its opinion with this statement:

"During all the past years they were not even required to file an income tax return, and understood that their income was not taxable and then suddenly, out of a clear sky, they say to the plaintiff in this case 'It makes no difference whether our ward be reduced to poverty and lose her lands, the taxes must be paid.' The Indians are entitled to receive and keep their lands free of all charge and encumbrance whatsoever and this Court, having no exact rule to follow

laid down by courts of superior jurisdiction, is of the opinion that taxation of income from trust property as in the present case, would be in violation of the government's agreements with the Indians and that the income involved in this action is exempt from taxation, and that this court should not permit an injustice such as this when the income tax statute in question has never been held to apply to Indians for a period of 35 years, and during which time the Indians have been lulled into security that their property held in trust by the government is free from taxation."

THE JONES VS. TAUNAH CASE

A. *The Jones* v. *Taunah case*, 186 F. 2d 445, *was based on a misunderstanding of the law enunciated in the cases of Choteau* v. *Burnet*, 283 U. S. 691, *and Superintendent of Five Civilized Tribes* v. *Commissioner*, 295 U. S. 418.

The case for nontaxability of income from restricted Indian trust property was clear until the foregoing case was decided on January 2, 1951. It is clear, in reading the case, that the court based its decision on a complete misunderstanding of the decisions in the *Choteau* v. *Burnet and Supt. of Five Civilized Tribes* v. *Commissioner*, cited above. On page 446 the Court says:

"Standing alone and without more, these general statutory provisions (the income tax law) are broad enough to include income derived from lands allotted to Indians and restricted against alienation, *Choteau v. Burnet*, 283 U. S. 691; *Superintendent of Five Civilized Tribes* v. *Commissioner*, 295 U. S. 418. And it has been held without deviation that exemp-

> tions from federal taxation do not rest upon implication. Unless expressly granted in plain terms, they do not exist."

What a misunderstanding of the law! The cases cited in the middle of this brief clearly hold that the rule as to implied exemptions is different when applied to Indians and that the general rule cited above does not even apply to Indians. The opposite is the law.

But the most astonishing thing is the Court's misinterpretation of the Choteau v. Burnet case. It is apparent that the Court didn't even read the case and didn't notice that, as to Mary Blackbird, the only litigant comparable to Mr. and Mrs. Jones in the Jones v. Taunah case, the exemption was allowed. It is apparent that the Court read only the appeal from the Circuit Court and not the Circuit Court case in 38 F. 2d 976. There was no appeal by Mary Blackbird because the Circuit Court held in her favor. Certainly the ruling against Mrs. Pettit, a white woman, and Henry Choteau, who didn't come within the definition of an Indian ward at all, is not applicable. Henry Choteau, had received his certificate of competency under a specific law applying to his tribe that thereafter his lands, except his homestead, would be taxable. Actually even in the Choteau case the holding was in our favor because it held that the income from his homestead (equivalent to the land in the Taunah and in the instant case) was not taxable.

The Superintendent of the Five Civilized Tribes v. Commissioner, supra, isn't authority to justify the holding

of the Court either. The facts aren't even similar and the question was not the taxability of the income from trust property, but the income from the reinvestment of the income from trust property.

The writer respectfully hopes that the Court will read the entire decisions in Choteau v. Burnet and Five Civilized Tribes v. Commissioner and will note for itself how much error in the contentions of the Government in its present efforts to tax the pertinent income is based on misinterpretations of those two cases perpetuated by "requotes" through subsequent opinions.

REPLY TO PETITIONER'S BRIEF

The cases cited by petitioner demonstrate how, even in the field of Indian Law, each case must stand on its own merits and each case must be carefully read before assuming it applies to instant case.

The court will refer back to our discussion, supra, about the misinterpretation of the *Choteau* v. *Burnet*, 283 U. S. 691, and *Superintendent* v. *Commissioner*, 295 U. S. 418. Yet, on page 11 of his brief, petitioner perpetuates this misunderstanding. I believe my explanation above of these two cases should be enough to show that they do not support petitioner's views at all. As explained, there was no issue in either case pertinent to present case. Mary Blackbird, in the Choteau case, won in the Circuit Court and she didn't appeal. The Superintendent v. Commissioner case merely holds that the income resulting from

the investment of exempt income is taxable. We have no quarrel with that. We would have a similar situation here if the Capoemans had reinvested their timber money in Ford stock and were claiming the dividends nontaxable.

Petitioner cites the case of *Heiner* v. *Colonial Trust Co.*, 275 U. S. 232, and *Commissioner* v. *Glenshaw Glass Company*, 348 U. S. 426, as authority for his position that Congress intended to extend the taxation to the pertinent income. The first case merely holds that the income of a non-Indian lessee of Indian land is not exempt. The Court says:

> "Assuming that the Indians are not subject to income tax, as contended, the fact that they are wards of the government is not a persuasive reason for inferring a purpose to exempt from taxation the income of others derived from their dealings with the Indians . . . Any implication of the exemption of the income of the Indians themselves, if made, must rest on too narrow a basis to justify the inclusion of the income of other persons . . .

If that case is authority for anything, it is authority for the position of the Indians here.

The second case, Commissioner v. Glenshaw Glass Company can be read in vain for any relevant material and holds merely that compensation received in a fraud or anti-trust case for damages is taxable income.

On the same page petitioner cites *Strom* v. *Commissioner*, 158 F. 2d 520. This case, like the others, in no way supports petitioner's position. There is no analogy be-

tween the right to fish and income from allotted, restricted lands. There would be an analogy if, in this case, the return from the timber was not from plaintiff's own lands but from lands he was leasing from others.

On page 14 of petitioner's brief we find a repetition of these citations and others which should be read by the court before being accepted as authority for petitioner's position.

Oklahoma Tax Commission v. U. S., 319 U. S. 598, merely holds that "wardship with a limited power over his property did not, without more, render the Indian immune from the common burden." But that case then holds that the Indian allotted lands were immune to state estate tax and supports respondents' position here.

United States v. *Choctaw, etc.*, 179 U. S. 494, holds no more than that even though treaties with the Indians are given liberal construction in the Indians' favor is no reason to stretch or depart from the plain meaning of the words used. *Choctaw Nation* v. *United States*, 318 U. S. 423, cited by petitioner on page 14 of his brief, states the general rule in the first syllabus:

> "The relation between the U. S. and the Indian is such that treaties between them should receive such an interpretation as justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care and protection, without regard to technical rules framed under a system of municipal jurisprudence formulating the rights and obligations of private persons equally subject to the same laws."

Again, on page 15 of his brief, petitioner cites the cases of Choteau v. Burnet and Superintendent v. Commissioner already discussed above and in no way supporting the contentions of the petitioner.

On page 16 of his brief petitioner cites *Landman* v. *Commissioner*, 123 F. 2d 787, as holding that an Indian's estate is subject to federal estate tax. But counsel does not cite the case of *Landman* v. *United States*, 71 F. Supp. 640, decided in the Court of Claims several years later where, on page 747, this later case expressly excepts to the decision of the earlier Landman case and refuses to apply the rule applied in that case and specifically overrules it, if such can be done by the Court of Claims.

It is hoped that the Court will read this later Landman case. The first Landman case held that the net estate of a deceased full blood restricted Creek Indian consisting of a restricted allotment and proceeds of oil and gas produced therefrom were subject to federal estate tax. The case of *Oklahoma Tax Commission* v. *United States*, 319 U. S. 598, held similar property not to be subject to state estate tax. Then the later case of *Landman* v. *United States*, 71 F. Supp. 640 overruled the former Landman case and held (page 648) that, such property having been held to be immune from Oklahoma estate tax, there was "no valid reason for withholding such immunity from similar land sought to be burdened by a federal tax identical in character."

That case, much more than the first Landman case,

states the correct law with regards to Indian trust property. It cites in proper perspective the applicable decisions and particularly the case of *Carpenter* v. *Shaw*, 280 U. S. 363, as authority for the statement that "while, in general, tax exemptions are not to be presumed and the statutes conferring them are to be strictly construed, (citing cases), tax exemptions secured to the Indians by agreement between them and the government are to be liberally construed."

It is therefore seen that, in analysis, this whole sequence of cases supports the view of respondents and not of petitioner.

CONCLUSION

From the foregoing it seems clear that income derived by Indians from restricted, allotted, trust property under treaties and agreements similar to the treaty with the Quinaielts and the General Allotment Act of 1887 is exempt from Federal Income Tax and that the decision of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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NO. 134

IN THE

Supreme Court of the United States

October Term, 1955

CLARK SQUIRE, Collector of Internal Revenue for the District of Washington, *Petitioner*

v.

HORTON CAPOEMAN and EMMA CAPOEMAN, His Wife

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICI CURIAE

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BRIEF OF AMICI CURIAE

PRELIMINARY

The undersigned attorneys, on behalf of other members of Indian tribes vitally interested in the rule of law to be established in the present case, present herewith, with the consent of the parties, their views as amici curiae, and urge affirmance of the judgment below.

QUESTION PRESENTED

Whether monies received as a result of converting into cash a portion of the corpus of lands held in trust by the United States for non-competent Indians under the General Allotment Act of 1887, are taxable as income for Federal income tax purposes?

STATEMENT

Horton Capoeman, and his wife Emma, who are the taxpayers here involved, are non-competent Indian wards of the United States (R. 33). On October 1, 1907, pursuant to the General Allotment Act of 1887 (24 Stat. 388), a trust patent was issued to Horton Capoeman for 93.25 acres of tribal land. The fee title to this land was and still is held by the United States in trust for Horton Capoeman, and said land was not and still is not subject to alienation or encumbrance by Capoeman except with the consent and approval of the United States.

During 1943, $8,418.28 worth of timber was cut, sold and paid for from Capoeman's allotted land, pursuant to a contract of sale entered into by the Bureau of Indian Affairs of the United States. Capoeman received a distribution of $1,537.00 of the $8,418.28 sales price, and the remaining $6,878.00 ($3.28 unaccounted for) was placed in trust by the United States for the sole use and benefit of Capoeman.

On October 10, 1949, Capoeman filed a joint income tax return for calendar 1943, reporting a long term capital gain from the timber sale in 1943, and paid the tax shown due.

On January 2, 1948, Capoeman filed a claim for refund of the taxes paid on the ground that the monies

received from the sale of timber from the allotted land were not subject to taxation as income because such taxation would violate the trust patent. On January 21, 1948, the Bureau of Internal Revenue denied the refund claim. (R. 35-40).

SUMMARY OF ARGUMENT

Under Section 5 of the General Allotment Act of 1887 (24 Stat. 388), the United States is obligated to hold Capoeman's allotted land "in trust for the sole use and benefit of the Indian" and at the end of the trust period to convey the land to the Indian in fee, "discharged of said trust and free of all charge or incumbrance whatsoever." The timber was a part of the real property held in trust. Sale of the timber was a sale of a part of the realty, and the price received for the timber was only a substitute for the real estate. The transaction was the same in quality and kind as the sale of a parcel of land out of a larger tract. The money received from the timber sale was a substitute for a portion of the corpus of the trust, and stood in lieu therof. Until the allotted trust land is conveyed to the Indian in fee and the trust discharged, it is not a capital asset subject to tax or any other charge or incumbrance which might diminish its value.

ARGUMENT

Section 5 of the General Allotment Act of February 8, 1887 (24 Stat. 388) provides in pertinent part:

> "* * * upon the approval of the allotments provided for in this Act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees * * * and declare that the United States does and will hold

> the land thus allotted * * * in trust for the sole use and benefit of the Indian to whom such allotment shall have been made * * *, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever * * *"

Alienation by the Indian of the trust land so allotted is restricted, (24 Stat. 388), and the trust continues in force today (48 Stat. 984). Some collateral questions such as the language of the treaties with the Quinaielts of 1855 and 1856 (12 Stat. 971), the tribe to which Capoeman belonged, Internal Revenue regulations relating to timber (Treas. Reg. 111, Sec. 29.23 (m)-20), and certain forest regulations (25 C. F. R., c. I, Sec. 61) have been raised in the Government's brief. However, the central and critical question is the meaning of the phrase "free of all charge or incumbrance whatsoever" as it occurs in Section 5 of the General Allotment Act. This tax exemption, once granted by Congress, is a vested property right which cannot constitutionally be impaired by subsequent legislation. *Choate* v. *Trapp*, 224 U. S. 665 (1912). Therefore, insofar as the broad statutory concept of income as used in the Internal Revenue Code, I.R.C. Sec. 22(a), is repugnant to this tax exemption, it is void.

The giving up by these Indians of their nomadic life, their communal lands and property, the adoption of the white theory of individual ownership, the stopping of Indian wars, the opening of their lands to white settlement, all constitute a valid and valuable consideration for the tax exemption, as opposed to a gratuitous tax exemption. As the laws of gratuitous suretyship, and suretyship for hire, are different, so

are the laws of gratuitous exemption and exemption for a consideration.

The United States was always the moving party in the course of dealing with the Indian; yet its treaties were never unilateral. The Indian was sought out by envoys, (usually the military) of the United States, and solemn agreements were drawn and formally entered into. While they appear to be "treaties", actually "strong arm" methods were employed with the Indians being advised that if they did not sign; that war would follow and the white man could and would take their lands by force. The trial court's statement concerning "somewhat coercive bargaining" is an understatement.

The failure to use the word "taxation" in the agreements with the Indians may be attributed to the fact that when these agreements were entered into, there was no Federal Income Tax. The more inclusive word "incumbrance", having a far broader connotation in the white men's mind, was used.

The rule has long obtained that judicial construction of Acts of Congress relating to Indians is liberal, not strict. Doubtful expressions are not to be resolved in favor of the United States, but in the best interests of the Indians, who are wards of the Government and wholly dependent upon its protection and good faith in carrying out its statutory pledges. In *Carpenter* v. *Shaw*, 280 U. S. 363, this Court said:

> "* * * doubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith."

See also *Worcester* v. *George*, 6 Pet. 515, *Jones* v. *Meehan*, 175 U. S. 1, and *U. S.* v. *Rickert*, 188 U. S. 432.

This, then is the rule of construction to be applied.

This Court has spoken before on the meaning of the General Allotment Act. In *U. S.* v. *Rickert*, 188 U. S. 432, this Court held that lands allotted under the General Allotment Act were exempt from state taxation during the trust period, on the ground that taxing such lands during the trust period would be to tax an instrumentality of the United States. This basis has since been modified to some extent, but the second basis for the holding was stated as follows:

> "* * * if they may be taxed, then the obligations which the Government has assumed in reference to these Indians may be entirely defeated, for by the Act of 1887, the Government has agreed at a named time to convey the land to the allottee in fee, discharged of the trust, 'and free of all charge or encumbrance whatsoever.' To say that these lands may be assessed and taxed * * * is to say they may be sold for the taxes, and thus become so burdened that the United States could not discharge its obligations to the Indians without itself paying the taxes imposed from year to year, and thereby keeping the lands free from encumbrance."

While the Rickert case was concerned with a state ad valorem tax, there would seem to be no difference. A rose is a rose, regardless of name.

The Rickert decision came down in 1902. Subsequently, in 1906, Congress amended Sec. 6 of the General Allotment Act (34 Stat. 182) to provide that at the end of the trust period, "all restrictions as to sale, incumbrance, or taxation, shall be removed." This is

proof positive that Congress intended the allotted trust lands to be tax exempt.

During the 1920's, the Government engaged in a wholesale patenting in fee of Indian trust lands, whether the Indian desired it or not. As a result, the fee owners became liable for taxes. Shortly thereafter the Government reversed its policy and canceled these fee patents. Numerous suits were filed to enjoin state taxation and to strike these allotments from the tax rolls, and the Government was successful in each case, on grounds well expressed in *U. S. v. Nez Perce Co.*, Idaho, 95 F. 2d 232.:

> "* * * the Allotment Act (of 1887) as well as the trust patent, by plain implication granted the Indian immunity from taxation during the trust period or any extension of it, and he had the right finally to receive his lands 'free of all charge or encumbrance whatsoever.' The authorities are uniform to the effect that this right of exemption is a *vested* right, as much a part of the grant as the land itself, and the Indian may not be deprived of it by the unwanted issuance to him of a fee patent prior to the end of the trust period. * * * Treaties with the Indians and Acts of Congress relative to their right in property reserved to them have always been liberally construed by the Courts. The dependent condition of these wards of the Government makes it imperative that doubtful provisions in treaties and statutes be resolved in their favor."

This is a fair and reasonable statement of the construction to be given the Act of 1887.

In *U. S. v. Homeratha*, 40 F. 2d 305, it was held that income directly derived from the allotments under the 1887 Act is not subject to federal income tax. See

also *Blackbird* v. *Commissioner*, 38 F. 2d 976, and *Pittman* v. *Commissioner*, 64 F. 2d 740.

An "incumbrance" has a long established meaning in law as a claim or lien which burdens an estate. (42 C.J.S. 549, et seq). A tax is a burden, a lien, a claim, both contingent and actual. It diminishes the value of the fee, and all the wriggling with semantics that the Government musters in its brief does not change that melancholy fact.

Apart from the question of tax exemption and incumbrance is the fundamental obligation of the United States as trustee for its Indian wards. This obligation was defined and clarified by the U. S. District Court for the Western District of Washington in the case at bar. (110 F. Supp. 924):

> "The United States now has a sum of money in trust for these Indian wards. It is demonstrable that this amount is part and parcel of the corpus of a trust estate which the Government has held ever since the treaties of 1855 and 1856. Before that date, the Indians had rights of occupancy in a vast territory. These were ceded to the United States in return for protection and tutelage. But there was expressly reserved the title to a tract of land.[3] The United States held the legal title thereof as trustee. When the alottment acts were given effect, there was no change in this situation. The Indians simply relinquished their respective claims to a large area of communal lands, and each respectively accepted in lieu thereof equitable title to a definite parcel of land allotted in severalty. At the end of the trust period, a conveyance was to be made to the Indian or his heirs of such parcel of land in fee "discharged of said trust and free of all charge or incumbrance whatsoever."

"This is a simple restatement of the obligation of the trustee. As a result, the United States has no power to levy a duty or impose a charge upon the lands over which it has plenary power by virtue of ownership and sovereignty. The State of Washington can levy no tax on the whole or any part or parcel thereof. After the conveyance, which must be authorized by the Indian in order to burden him with the weight of obligation, the national and state governments are empowered to tax this land and its increments as the real property of any other citizen. It follows that, until the land is thus conveyed, it cannot be treated as 'capital' or a 'capital asset.' For, by such classification, the United States would be violating not only a moral right of the Indian, but would be violating the statute by placing a "charge or incumbrance" on the land. The state cannot collect back taxes upon land before the date of conveyance in fee to the Indians. The federal government has no right upon a sale by the Indian, immediately after a patent to him in fee, to tax the difference in value between the date of the treaty, or even March 1, 1913, and the date of sale as a capital asset. By that process it could destroy the value of the trust property. Likewise, there could be no tax upon a sale by the United States of ten acres out of an hundred acre allotment with the consent of the allottees before the end of the trust period. The reason is that the government had the real property in trust before the sale of part thereof, and the price received is only a substitute charge. But here the sale was of part of the realty. Timber, until severed, is part of the land. No distinction can be drawn between the operation and the sale of a parcel out of a larger area.

"During the long history of the Chancelors and in the equity courts, cutting of timber by one not the owner of the fee constituted waste, and the proceeds of timber cut by a trustee was a part of the

> trust estate. If the timber had remained standing upon the land until patent issued in fee, neither state nor national government could have taxed it because it was part of the trust property. Nor on sale of the severed timber after patent could the increment in value be based upon a date prior to the transfer of the land to the Indian."

It is significant that the U. S. Court of Appeals adopted the trial court's opinion and reasoning as its own, and characterizing the Government's position thusly:

> "Enough to say that in our view this attempt to tax evidences, at the least, a sorry breach of faith with these Indians. We may say that while the court below appeared to regard as distinguishable the decision of the Tenth Circuit in the cognate case of *Jones* v. *Taunah*, 186 F. 2d 445, we see no ground upon which the holding can be distinguished. Rather, we agree with the dissenting opinion of Chief Judge Phillips."

The United States as a trustee for the Indians is duty bound to maintain the trust estate intact. If a smaller portion of the trust estate is detached from the larger area, it does not *ipso facto* undergo some strange alchemy and become income—it remains a part of the corpus of the trust estate. If a lesser portion of the trust estate is substituted for property of another kind, the exchanged property is a part of the corpus and must be maintained intact in accordance with the terms of the trust arrangement. If a smaller portion of the trust estate is converted into cash, the cash becomes a part of the trust estate and must be held intact for the Indians (wards). Timber, like oil, is a part of the real estate held in trust. It is a wasting asset, extraction or severance of which invades and diminishes

the value of the trust estate corpus. The situation cannot be more clearly described than it was in Chief Judge Orie Phillips' dissent in *Taunah* v. *Jones*, 186 F. 2d 445; a similar case involving oil sales from restricted, allotted trust lands:

> "For income tax purposes all of the proceeds derived from oil and gas is regarded as gross income. But viewed realistically, oil and gas are exhaustible and irreplacable natural resources. Once withdrawn from land they are gone forever. Ordinarily, when oil and gas is found in land in paying quantities, the oil and gas rights are much more valuable than the surface. Had the United States not permitted the oil and gas to be removed from the original allotments during the trust period, under departmental leases and in consideration of royalties paid to it for the benefit of the allottees, it would have been obligated at the end of the trust period to transfer to each allottee his allotted land in fee simple, free and clear from all charges and encumbrances, including both the surface rights and the oil and gas and other minerals in the land. What it in effect did, acting as trustee for the allottees, was to exchange the oil and gas for cash during the trust period. Its obligation, under the agreement, in my opinion, at the end of the trust period will be to transfer the land and the cash which it received for the oil and gas extracted from the land, undiminished. To do less than that would not be to fulfill either the letter or the spirit of its obligation under the agreement of October 21, 1892.
>
> "With respect to the inherited lands, no such obligation exists. The right to take property by descent is a privilege or creature of the law and not a matter of inherent right. The obligation of the United States to convey the original allotment undiminished to the allottees at the end of the trust period would not lawfully be changed. To do so

would impair the contract period. But the right of the heirs of an allottee to take his allotment is a mere privilege of the law and is subject to change at the will of Congress.

"With respect to the income derived by the allottee from oil and gas royalties from his original allotment, the instant case is distinguishable from *Oklahoma Tax Commission* v. *United States*, 319 U. S. 598. That case dealt with a state inheritance tax and not income tax on royalty received under an oil and gas lease of an original allotment. That tax diminished what an heir received. The tax here on oil and gas royalty from the original allotment will diminish what the original allottee will receive.

"For the reasons indicated I would hold that the royalties derived from leases on the original allotments are not subject to Federal income tax, but that interest earned by investment of royalty funds, agricultural income and royalty income from inherited lands are subject to Federal income tax."

What the case at bar presents is not a problem in tax administration, but a capital levy. The federal tax authorities seek in the guise of an income tax to seize a portion of an Indian's trust estate, an estate which is restricted and inalienable, an estate over which the Indian ward has no unrestricted power of disposition. The federal tax officials, in an endless quest for fuel to feed the money needs of a central Government, have become deaf and dumb and blind to logic and common fairness. If wasting assets held in trust become income when converted to cash, the Indians will receive precious little by way of capital distribution when the day of reckoning up and discharging the trust arrives. Imposition of federal income tax on monies received

in lieu of portions of the trust corpus is inconsistent with the Government's obligation to hold the trust estate intact for its Indian wards.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals is correct, and should be affirmed.

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